Supreme Court, U.S.
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179

10-908

No. _____

In The
SUPREME COURT OF THE UNITED STATES

RICHARD JOHN FLORANCE, JR., et al.,
Plaintiff-Appellant-Petitioner,

v.

RICHARD A. SCHELL, et al.,
Defendants-Appellees-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ORIGINAL PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX A

RICHARD JOHN FLORANCE, JR.
1908 VASSAR DRIVE
RICHARDSON, TEXAS, 75081

Questions Presented

Signature authority—appellate court

Actual use

1. Did any appellate court (deputy) clerk actually sign an order?

Source of Clerk's signature authority

2. Does 28 U.S.C. § 711 violate Due Process or Separation of Powers?

3. Does 28 U.S.C. § 956 violate Due Process or Separation of Powers?

4. Does FED. R. APP. P. 27(b) violate Due Process or Separation of Powers?

5. Does 5TH CIR. R. 27 violate Due Process or Separation of Powers?

Compelled consent

6. Does an appellate (deputy) clerk have decision-making authority, at all?

7. If so, what besides unanimous consent provides that authority?

8. May the appellate court compel consent to non-judicial decision-making?

Denial of Access, Witness tampering, etc.

9. Do the appellate court's sanctions violate Due Process?

Service of Process

10. May a defendant lawfully avoid process by refusing to accept mail the defendant knows is the Summons and Complaint?

11. Did BOYLE abuse discretion by refusing to allow more time for Service?

Signature authority—trial court

Non-judicial decision-makers

12. Did BOYLE err by referring this case, in any part, to a magistrate?

Immunity for criminal conduct?

13. Did BOYLE err by dismissing RJF's claim(s) against each of the following:

    a. SCHELL
    b. EASTERN DISTRICT OF TEXAS
    c. BUSH
    d. MALAND

e. KING
f. SMITH
g. WIENER, JR.
h. GARZA
i. CLEMENT
j. PRADO
k. DEMOSS
l. FIFTH CIRCUIT

m. COLVIN
n. COHEN
o. MORRISON
p. VASQUEZ
q. DITROLIO
r. TAX COURT

s. SHULMAN
t. ROTHENBERG
u. SHEEHAN
v. KORB
w. POTTER
x. THOMAS
y. BENFORD
z. GARBER
aa. FLICK

bb. RUSCH
cc. BARRY
dd. DAVIS
ee. MATTHEWS, STEIN, etc,
ff. TAYLOR
gg. ROACH
hh. WESTERFELD
ii. MILLER
jj. RICHARDSON

kk. SOLOMON
ll. YOON KIM
mm. FREDERICKS
nn. SMITH
oo. COLLIN COUNTY

pp. PATTEN
qq. MIMS
rr. CITY OF PLANO
ss. STEVENSON
tt. PLANO MUNICIPAL COURT

uu. JP COURT, PRECINCT 3, PLACE 1
vv. BROCATO
ww. FIFTH DISTRICT

xx. STATE

yy. U.S.
zz. USOA

14. Did BOYLE err by declining to award declaratory relief?

    a. Does the (magistrate) Consent form violate Due Process?
    b. Does ND TX R. 16.2 violate Due Process and/or Separation of Powers?
    c. Does Special Order 3-251 violate Due Process?
    d. Do Misc. Order No. 6 and its supplemental Special Order 2-59 violate Due Process?
    e. Is BUCHMEYER's sanctions "order" null and void?

f. Do Tax Court Rules (TCRs) 182, 183, 70(a)(1), 90(a), 120, 121, and 160 violate Due Process?
g. Does TCR 91 violats public policy?
h. Does irc § 7443A(c) violate Due Process?
i. Do TEX CRIM. PROC. CODE arts. 4.03 and 45.0215 violate Due Process?
j. Do TEX. RS. APP. P. 25.2(a)(2) and 25.2(d) violate Due Process?
k. Did STATE's appellate court ever have authority to enter the "ruling" in No. 05-08-01301-CR, much less fabricate the facts on which that "ruling" is based?
l. Is RUSCH's "ruling" in Misc. No. 401-02217-06 void?
m. Is irs Notice 2008-14, which purports to justify administrative sanctions for arguing **"taxpayer" means "fiduciary"**, extortionate and/or otherwise defiant of Due Process?

More criminal conduct

15. Did BOYLE abuse her discretion by sanctioning RJF?

16. On reinstatement, should BOYLE be instructed not to participate?

Parties

Petitioner(s)

Richard John Florance, Jr., and RICHARD JOHN FLORANCE, JR. ("RJF")
Richardson, Texas

Defendants

Richard A. Schell and RICHARD A. SCHELL,

United States District Court for the Eastern District of Texas and
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS,

Don Bush and DON BUSH,

David J. Maland and DAVID J. MALAND,

Carolyn Dineen King and CAROLYN DINEEN KING,

Jerry E. Smith and JERRY E. SMITH,

Jacques L. Wiener, Jr., and JACQUES L. WIENER, JR.,

Emilio M. Garza and EMILIO M. GARZA,

Edith Brown Clement and EDITH BROWN CLEMENT,

Edward C. Prado and EDWARD C. PRADO,

Harold R. DeMoss, Jr., and HAROLD R. DEMOSS, JR.,

United States Court of Appeals for the Fifth Circuit and
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ("the fifth"),

John O. Colvin and JOHN O. COLVIN,

Mary Ann Cohen and MARY ANN COHEN,

Richard T. Morrison and RICHARD T. MORRISON,

Juan F. Vaquez and JUAN F. VASQUEZ,

Robert R. DiTrolio and ROBERT R. DITROLIO,

United States Tax Court and UNITED STATES TAX COURT,

Douglas Shulman and DOUGLAS SHULMAN,

Gilbert Rothenberg and GILBERT ROTHENBERG,

Anthony T. Sheehan and ANTHONY T. SHEEHAN,

Donald L. Korb and DONALD L. KORB,

Clarissa C. Potter and CLARISSA C. POTTER,

Thomas R. Thomas and THOMAS R. THOMAS,

Gary A. Benford and GARY A. BENFORD,

Abbey B. Garber and ABBEY B. GARBER,

Adam L. Flick and ADAM L. FLICK,

Mark J. Rusch and MARK J. RUSCH,

John O. Barry and JOHN O. BARRY,

Robert J. Davis and ROBERT J. DAVIS,

MATTHEWS, STEIN, SHIELS PEARCE, KNOTT, EDEN & DAVIS, L,L.P. ("MATTHEWS, STEIN, etc."),

Brenda Taylor and BRENDA TAYLOR,

John R. Roach and JOHN R. ROACH,

Andrea Westerfeld and ANDREA WESTERFELD,

Courtney Miller and COURTNEY MILLER,

Jonathan Richardson and JONATHAN RICHARDSON,

Amanda Solomon and AMANDA SOLOMON,

Yoon Kim and YOON KIM,

Christopher M. Fredericks and CHRISTOPHER M. FREDERICKS,

Chad Smith and CHAD SMITH,

County of Collin and COUNTY OF COLLIN,

Rodney D. Patten and RODNEY D. PATTEN,

Paige Mims and PAIGE MIMS,

City of Plano, Texas, and CITY OF PLANO, TEXAS,

Don Stevenson and DON STEVENSON,

Plano Municipal Court and PLANO MUNICIPAL COURT,

City of Dallas, Texas, and CITY OF DALLAS, TEXAS,

JP Court, Precinct 3, Place 1, Dallas County and JP COURT, PRECINCT 3, PLACE 1, DALLAS COUNTY,

Anthony G. Brocato, Jr., and ANTHONY G. BROCATO, JR.,

Fifth District Court of Appeals and FIFTH DISTRICT COURT OF APPEALS,

STATE OF TEXAS ("STATE"),

UNITED STATES ("U.S."), and

UNITED STATES OF AMERICA ("USOA")

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JAMES B. PINSON
CITY OF DALLAS

JOSEPH A. PITZINGER, III
doj, tax division

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Petition for a Writ of Certiorari

RJF petitions for a writ of certiorari to the federal appellate court as follows:

Citations to decisions below

None.

Jurisdiction

(i) Date of clerical, sanctions-based dismissal
30 September 2010 [+90: 29 Dec 2010].
No. 10-10803.

(ii) Extension N/A

(iii) Rule 12.5 N/A

(iv) Statutes, Jurisdiction
28 U.S.C. §§ 1254(1), 2101(c).
See also S. CT. R. 11 and § 2101(e).
See also Cohen, 337 U.S. at 547; *Coopers & Lybrand*, 437 U. S. at 468; *Moses H. Cone Hospital*.

(v) Regarding Rule 29.4(b) and (c)
United States and United States corporations are parties. STATE and its relevant corporations are parties. All activity in the federal courts.

No Oral Argument Requested

Oral argument is not expected to aid in the resolution of this matter.

Statement of the Case

Trial Court Jurisdiction

28 U.S.C. §§ 1331, 1332, 1333(1), 1343, 1346, 1349, and 1367.

Threshold focus

Sanctions-based dismissal on appeal. The (preliminary) merits issues are presented *pro forma*.

Signature authority—appellate court

RJF repeatedly objected to non-judicial decision-making.

"The fifth", via CAYCE, bulldozed RJF's objection clearly asserted in his Notice of Appeal.

CAYCE's first "ruling", 18 August 2010, is a "show cause order" demanding that RJF request permission to proceed. A deputy signed for CAYCE and the FIFTH CIRCUIT Court. RJF filed motions and submitted his Brief and Record Excerpts within that 30-day period.

CAYCE's second "ruling", 20 September, confirms receipt of RJF's Brief, Record Excerpts, and motions. CAYCE also asserts the intent/decision to ignore all documents submitted. A deputy signed for CAYCE and the FIFTH CIRCUIT Court.

CAYCE's third "ruling", 30 September, dismisses the appeal. A deputy signed for CAYCE and the FIFTH CIRCUIT Court.

Did a (deputy) clerk sign an order?

RJF's mixed question of fact and law arises from the mixed-capacity letterhead. Those "rulings" are ***judicial*** acts, not clerical. No § 451 judge has the authority to delegate the § 451 power.

S. CT. RULE 11.

If there is no ruling on appeal, yet, then Rule 11 applies. The national importance derives from the very reasons RJF is suing these defendants in the first place.

Regarding the challenged statutes and rules.

No Clerk has ***judicial*** authority. *Cf.* § 451 *with* § 711 *and* § 956. No Clerk is bound by oath to the laws of the United States. *Cf.* § 453 *with* § 951.

No *procedural* rule creates, much less expands, an office created legislatively. Thus, no *procedural* rule delegates ***judicial*** power or transforms the clerk's office into a § 451 judicial office (sans the § 453 oath).

The statutes aren't the problem. The problem is compelled consent to complete structural upheaval.

Compelled consent.

If a clerk has ***non-judicial*** decision-making authority, such arises only by unanimous consent. RJF overtly never consented.

Denial of Access, Witness tampering, etc.

Two positions sanctioned.

"TAXPAYER" MEANS "FIDUCIARY".

See No. 05-60552 (access restriction). *But see* No. 09-1181 (cert. denied)!

MAGISTRATES PARTICIPATE "BY CONSENT ONLY".

Waived? CAYCE's "order" of Aug. 18 includes only No. 05-60552. *Cf.* No. 10-10057 (No. 09-1181) (clerk's "order" of Jan. 26 *includes* No. 07-40129). [1]

[1] Did FULBRUGE ***finally*** figure it out and update the records? By leaving, did he withdraw from this very conspiracy?

Waiver, estoppel.

See No. 07-40130. "The fifth" granted relief to RJF and never issued any "show cause order".

Regarding the merits

This is likely the largest criminal conspiracy case of its type in the history of this nation. Trial and appellate "judges", "clerks", "magistrates", and "attorneys", both state and federal, have combined under color of law and office to overthrow the law of "this state". As this Record proves, the conspiracy still grows in conspirators *and* crimes! Capone thought he was "untouchable". Then came Ness.

Service of Process

Eight defendants avoided/obstructed Service.

BARRY ("judge"), FREDERICKS ("prosecutor"), RICHARDSON ("prosecutor"), ROACH ("DA"), RUSCH ("judge"), COLLIN COUNTY via SELF (county judge), SOLOMON ("prosecutor"), and WESTERFELD (DA's appellate staff), all refused to accept their Restricted Delivery mail, from at least 10 December 2009 to 15 January 2010. *See* RJF's eight motions for extension of time for service. [2]

All are associated with COLLIN COUNTY. All have "direct" connections with DAVIS, who signed for his. All knew what was in that padded envelope, with the unique size for mailing CD's, sent Restricted Delivery with RJF's return address clearly displayed.

As RJF documented, all the addresses are good; no first class item was returned. Further, the Restricted Delivery items were returned

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[2] Some orders mention Document Numbers. RJF can't confirm them. ND TX refused to provide even a Docket Sheet, much less a check-out copy of the Record.

"Unclaimed", not "Undeliverable". Thus, all eight were very blatantly violating at least 18 U.S.C. § 1501. All eight have the professional wherewithal to check into the matter on his/her own, and each has direct access to counsel.

The motive. DAVIS (BOYLE, ND TX, etc.) can't distinguish RJF from USPS. *See* DAVIS' motion(s), replies, etc., in No. 3:07-CV-125-M (ND TX, Dallas) and here. Some, e.g., DAVIS, may never understand "this state", e.g., how "long arm" statutes work despite *Pennoyer v. Neff*, how it's lawful to ***export*** a criminal case, *Graham*, or how it's lawful to try O.J. Simpson for murder ***without*** Indictment. Thus, they act under color to deny the right (not to) contract.

Service by mail happens in the *state* system "daily". *See, e.g.*, trial Record for No. 09-1181.

BOYLE blessed these criminal acts of Service avoidance/obstruction with both (A) denial of RJF's motions for more time to serve the avoiders and (B) sua sponte dismissal of the claims against each.

Signature authority—trial court

Non-judicial decision-makers.

RJF overtly and repeatedly objected. Therefore, BOYLE's "referral" is facially illegal, and no magistrate ever had signature authority.

Immunity for criminal conduct?

SCHELL, BUSH, MALAND, and ED TX.

In No. 4:06-CV-175 (ED TX, Sherman), RJF and his daughter, Amanda, appearing *in pro per*, Removed two "ticket" cases from the county court. *See* No. 10-172 (cert. denied). They refused to consent to magistrate participation, but SCHELL "referred"

the matter to BUSH, anyway, and BUSH "signed" "orders", anyway. SCHELL, BUSH, and MALAND pressed this matter so far that RJF and Amanda detailed the crimes being committed by each of them. SCHELL retaliated, charging Amanda with criminal contempt. SCHELL "ordered" the US Atty's office (ORWIG) to prosecute, even though (A) there was no "order", at all, ***to*** violate, (B) there was no violation of any order, (C) nothing had occurred in SCHELL's presence (i.e., this was a pleadings issue), and (D) neither RJF nor Amanda had ever animated the FEDERAL CAPACITY. ORWIG resigned a few months later, completing one year in that office, and no prosecution of Amanda followed. No prosecution of SCHELL has occurred, yet, either.

SCHELL called a hearing, obviously intending to use his office as a bully-pulpit to coerce, intimidate, etc., RJF and Amanda to stop being witnesses against him, BUSH, and MALAND. DAVIS just happened to call SCHELL during the hearing. SCHELL took the call while on the bench in the middle of the hearing.

In No. 4:06-CV-510 (ED TX), which became No. 07-40130, RJF Removed No. 002-81238-06. [3] First time through, SCHNEIDER Remanded using the equivalent of clerical Notice of Deficiency. "The fifth" reinstated the case. SCHNEIDER then "referred" the matter to a "magistrate" over RJF's objections. ***Again***, BUSH participated. ***Again***, MALAND filed those facially illegal orders. *See* No. 07-1179 (mand. denied) (one week after *Gonzalez*).

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[3] *See* No. 09-1028 (pet. "denied"). The Court declared that matter "civil" by exercising jurisdiction at all. TEX. R. APP. P. 56.1(b); GOV'T CODE § 22.001(a).

KING, SMITH, WIENER, JR., GARZA, CLEMENT, PRADO, DEMOSS, JR., and the FIFTH CIRCUIT.

See **Denial of Access, Witness tampering, etc.,** *supra* p.3. Each of these "judges" has sanctioned one or more of the **"taxpayer" means "fiduciary"** litigants.

KING, JOLLY, and DEMOSS (TELLO).

SMITH, GARZA, and PRADO (Stearman).

KING, WEINER, and DEMOSS (Florance).

DEMOSS, STEWART, and PRADO (Wallis).

JOLLY, BENAVIDES, and HAYNES (BRAQUET).

GARZA, CLEMENT, and OWEN (COLLARD).

HIGGINBOTHAM, STEWART, and OWEN (the TAYLORS).

JOLLY, STEWART, and PRADO (RJF) (No. 07-40129).

COLVIN, COHEN, MORRISON, VASQUEZ, DITROLIO, and the UNITED STATES TAX COURT.

In Docket Nos. 11782-03 and 18209-03L, RJF withdrew the cases from the "small tax case" procedural option after WOLFE engaged in criminal Record-tampering. COLVIN then assigned VASQUEZ, who proceeded to "unfile" some 60 documents by way of "secret", "clerical" "orders".

VASQUEZ then sanctioned RJF monetarily, because RJF demanded that the law, **"taxpayer" means "fiduciary"**, be recognized and applied.

In Docket Nos. 26283-07 and 7364-08, COLVIN first assigned COHEN, who proceeded immediately to "unfile" a total of 100 documents by way of "secret", (unconsented-to) "clerical" "orders".

COHEN got off the case, and COLVIN assigned MORRISON, who proceeded to "unfile" at least one more document. Compelled to make the point another way, RJF submitted a Probable Cause Affidavit documenting 170 criminal Counts arising from that one "unfiled" document.

SHULMAN, ROTHENBERG, SHEEHAN, KORB, POTTER, THOMAS, BENFORD, GARBER, and FLICK.

In Docket Nos. 11782-03 and 18209-03L, comm'r, via the identified attorneys of Record, demanded sanctions against RJF for his arguing the law and for demanding proof of the alleged trust agreement being enforced.

In Docket Nos. 26283-07 and 7364-08, comm'r, via the identified attorneys of Record, again demanded sanctions against RJF for the same reason(s).

On appeal, in No. 05-60552, comm'r, via at least these two appellate attorneys of Record, demanded *more* sanctions for the same reason(s).

RUSCH, BARRY, DAVIS, MATTHEWS, STEIN, etc. L.L.P., TAYLOR, ROACH, WESTERFELD, MILLER, RICHARDSON, SOLOMON, YOON KIM, FREDERICKS, SMITH, and COLLIN COUNTY

RUSCH, A PROCESS AVOIDER.

In No. 401-02217-06, RUSCH not only proceeded to final "judgment" via Star Chamber, i.e., no Notice, and not only "found" that the "Notice of Lien" in question "IS NOT" a claim on property, thereby kicking the entire matter out of the statute, GOV'T CODE §§ 51.901, 51.903, but also adjudged it "fraudulent", anyway, even though it had no

evidentiary value whatsoever. STATE had no "actual grievance", i.e., no standing; hence, RUSCH had no jurisdiction. [4] No. 07-171 (cert. denied) seems to have confused all except RJF!

BARRY, A PROCESS AVOIDER.

In No. 002-81238-06, Judge Lewis struck PENAL CODE § 32.49 as vague and dismissed the case. STATE appealed. The appellate court reinstated the statute and the case. When Judge Lewis self-recused, the case was transferred to BARRY.

BARRY proceeded to exercise jurisdiction over this civil non-case. *See* No. 09-1028. BARRY refused to hear RJF's motions and then commingled pre-trial habeas into the underlying Record. He locked up the Record in his office for the 9-10 days immediately preceding trial. BARRY issued "secret" "orders", refusing to serve his "orders" on RJF, compelling RJF constantly to look through the Record to find out the case status. STATE's silence on appeal tends to confirm that STATE got a wiretap on RJF's phone for purposes of finalizing trial strategy. Ultimately, BARRY sentenced RJF to 180 days in jail, assessed a

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[4] In No, 401-02315-2010 (Bill of Review), RUSCH, a Service avoider, refused to recuse. He defends his Star Chamber ruling in No. 401-02217-06. He dismissed the Bill of Review, ***twice***. Neither order was served (timely). Then, RUSCH refused to rule on the R. 306a(5) motion to establish the appellate timetable. He refused to enter Findings and Conclusions. On DAVIS/TAYLOR's pleading-less motion, RUSCH declared RJF a "vexatious" litigant. *See* CIV. PRAC. & REM. ch. 11. Then, without dissolving the automatic stay, in a case already twice dismissed, RUSCH dismissed the case a third time, reaching DAVIS/TAYLOR's plea to the jurisdiction. Regarding the identity of the clandestine, *de facto* plaintiff in No. 401-02217-05, RUSCH distinguishes COUNTY and STATE, but neither had standing. Motion for new trial denied.

$2,000 fine, and ordered court costs of $298.48. In defiance of No. 09-1028, BARRY ordered RJF jailed.

DAVIS, THE PROCESS AVOIDANCE ADVOCATE.

Being inspired by the early, crime-laden, sanctions-permeated "tax court" decisions against RJF, DAVIS has repeatedly libeled/slandered RJF as a "litigation terrorist", i.e., a person intending to make political points by mindless, violent, murderous butchery of the innocent. DAVIS libeled/slandered RJF as recently as the hearing in October (2010) to declare RJF "vexatious".

DAVIS is the leader of the "criminal street gang" that is still growing in number and in number of criminal acts against RJF. There is too much more to include, here. The appellate Brief and the Record identify more of the relevant details.

MATTHEWS, STEIN, ETC., LLP.

DAVIS acts as agent for several entities, including his law firm, which aids and abets DAVIS' activities, and which conspires with him regarding DAVIS' criminal conduct.

TAYLOR.

In No. 001-1412-05, County Court at Law No. 1, Collin County, TAYLOR allowed, encouraged, and/or was deliberately indifferent to, the deputy clerks' criminal Record tampering. They refused, ***twice***, to file the motion for new trial, With DAVIS' help, TAYLOR began committing crimes directly, including Record-tampering, extortion, mail fraud, and simulation of process. In TAYLOR's name, DAVIS has libeled/slandered RJF and engaged his criminal rampage against RJF; hence, she's one of the intended beneficiaries of all of DAVIS' acts.

ROACH, A PROCESS AVOIDER.

In No. 002-81238-06, County Court at Law No. 2, then No. 3, Collin County, ROACH activated his criminal prosecution staff to persecute RJF, despite STATE's judicial confession in the 401st that RJF's "Notice of Lien" "IS NOT" a claim on property.

WESTERFELD, A PROCESS AVOIDER.

WESTERFELD assisted ROACH's criminal persecution team. She participated not only at trial but also on appeal. She responded to RJF's post-mandate motions in BARRY's court, recognized that RJF might be right (it's a civil case; *see* No. 09-1028), but encouraged BARRY to jail RJF, anyway.

MILLER.

In Nos. 003-81451-06 and 003-81453-06, County Court at Law No. 3, Collin County (BARRY), in the prosecution of RJF's daughter in the bogus ticket case(s), MILLER charged RJF with unauthorized practice of law in front of the jury. RJF was a subpoenaed parent of a minor in that matter.

RICHARDSON, A PROCESS AVOIDER.

In No. 002-81238-06, RICHARDSON is a member of ROACH's criminal persecution team.

SOLOMON, A PROCESS AVOIDER.

In No. 002-81238-06, SOLOMON is a member of ROACH's criminal persecution team.

YOON KIM.

In No. 002-81238-06, YOON KIM is a member of ROACH's criminal persecution team.

FREDERICKS, A PROCESS AVOIDER.

In No. 002-81238-06, FREDERICKS is a member of ROACH's criminal persecution team.

SMITH.

In No. 002-81238-06, SMITH is the "investigator" who swore out the criminal complaint against RJF, despite having no evidence, no statute, ***and*** STATE's judicial confession in the 401st that the "Notice of Lien" "IS NOT" a claim on property.

COLLIN COUNTY, A PROCESS AVOIDER.

COLLIN COUNTY has engaged in a uniform pattern of criminal conduct, especially where it comes to RJF. COLLIN COUNTY took no steps to stop any of it, and, instead, continued to finance those activities.

PATTEN, MIMS, CITY OF PLANO, STEVENSON, and PLANO MUNICIPAL COURT.

PATTEN.

PATTEN's amicus position in No. 05-05-01435-CV (Tex. App. Dallas) was more than "merely" malicious. PATTEN prosecuted RJF's daughter in the bogus ticket case(s), where the cops lied, and lied, and lied. PATTEN not only engaged in *ex parte* email motions and rulings with the muni court judge, STEVENSON, but also thrust himself into the appeal of the dismissal of No. 001-1412-05. PATTEN, like BROCATO, used his office to aid and abet the Collin County Clerk's Office's criminal Record-tampering. He was deliberately defiant of (indifferent to) clearly established policy, policy reiterated as clearly established in the published opinion for No. 05-05-01435-CV.

MIMS.

MIMS, as agent for PATTEN, made and used materially false documents in No. 3:07-CV-125 (ND TX, Dallas).

CITY OF PLANO.

The cops in the bogus ticket case(s) against RJF's daughter lied like big dogs. By the time the matter got to trial *de novo*, there were three different versions of what RJF's daughter did and didn't do, said and didn't say. Perjury and subornation of perjury speak for themselves.

STEVENSON.

In the bogus ticket case(s) against RJF's daughter, Nos. 2005007697, Plano Municipal Court, acting outside the scope of his jurisdiction, STEVENSON engaged in *ex parte* motions/rulings with PATTEN via emails. STEVENSON also instructed the clerk to file the "Failure to Appear" charge against RJF's daughter that STEVENSON then presided over, but regarding which he was ***disqualified***.

PLANO MUNICIPAL COURT.

See STEVENSON, *supra*.

JP COURT, BROCATO, and FIFTH DISTRICT COURT OF APPEALS.

JP COURT.

See No. JT 08 52744A (JP, Pct. 3, Pl. 1, Dallas), in the face of STATE's habitual failure to provide Notice, the JP displayed the intent to abuse RJF by smart-alec-ly denying, in front of a very full courtroom, RJF's motion to dismiss. The Constable [5] issued a ticket (typical fine $117) for non-display of the registration sticker ***after*** confirming by computer that the fees had been paid. That's attempted theft;

[5] This is a STATE matter, not a CITY OF DALLAS, matter. *See* DALLAS motion to dismiss and RJF's response.

the JP's defiance of the law aids and abets the attempted theft.

BROCATO.

PATTEN filed his deliberately indifferent amicus brief in No. 05-05-01435-CV *before* the clerk confirmed the appeal as timely. ***After*** the confirmation of timeliness, BROCATO filed his (STATE's) deliberately indifferent brief. BROCATO used his office to aid and abet the Collin County Clerk's Office's criminal Record-tampering activity, intending to help them avoid detection and/or prosecution for their criminal conduct against RJF.

FIFTH DISTRICT COURT OF APPEALS.

Being wrong and being criminal are two entirely different things. This appellate court has aided and abetted the abuse of trial jurisdiction in No. 002-81238-06 at every turn. Moreover, in the JP matter, in No. 05-08-01301-CR (Tex. App. Dallas), this appellate court entered a "ruling" using fabricated facts, which ruling they then refused to withdraw.

STATE.

STATE initiated the litigation against RJF. STATE has aided and abetted by failing and/or refusing, with deliberate indifference, to teach the law to its executive and judicial officers, members of the bar, and other officers, employees, and agents. For those failures/refusals, STATE has made itself an active player in the conspiracy against RJF, rendering STATE jointly and severally liable for the entire amount of damages.

USOA/U.S.

USOA/U.S. have aided and abetted all federal crimes by failing and/or refusing, with deliberate

indifference, to teach the law to its executive and judicial officers, and other officers, employees, and agents. For those failures/refusals, USOA/U.S. have made themselves active players in the conspiracy against RJF, rendering USOA/U.S. jointly and severally liable for the entire amount of damages.

No declaratory relief, either

BOYLE entered no declaratory ruling.

ND TX local rules.

ND TX's systemic policy compels consent to magistrate participation.

BUCHMEYER's fraudulent sanctions order.

BUCHMEYER's "order" identifies RJF as the ***defendant*** but sanctions RJF as the *plaintiff*.

TCRs.

The challenged TCRs violate Due Process and/or directly support the "tax court's" systemic policy of compelled consent to non-judicial decision-making.

STATE's statutes and rules.

RJF challenges provisions in STATE's Criminal Procedure Code and Rules of Appellate Procedure.

No. 05-08-01301-CR.

The ruling in 1301 is both factual fabricated and wholly without jurisdiction; no county court order.

Bill of Review.

Given RUSCH's self-apparent interest in the matter, while RJF has recently initiated in the state court a Bill of Review proceeding regarding No. 401-02217-06, namely No. 401-02315-2010, he started by requesting federal relief.

irs Notice 2008-14.

This irs Notice purports to justify ***more*** extortion by allowing administrative sanctions, as "frivolous", the assertion of **"taxpayer" means "fiduciary"**.

More criminal conduct

BOYLE has joined the conspiracy full-tilt!

BOYLE ***sanctioned*** RJF for asserting his right of redress. In defiance of *Gonzalez*, BOYLE compelled RJF's consent to magistrate participation. Thus, she has committed the very crimes compelling this suit. BOYLE even allowed eight defendants to violate the federal laws regarding avoiding/obstructing Service, then rewarded them by dismissing them out.

Argument

Signature authority—appellate court

Actual use.

1. **Did any appellate court (deputy) clerk actually sign an order?**

RJF sees three documents produced, signed, and entered of Record, over RJF's objections, by CAYCE, a non-judicial decision-maker, for the FIFTH CIRCUIT Court, with complete support and approval of the entire court.

Source of Clerk's Signature Authority.

2. Does 28 U.S.C. § 711 violate Due Process or Separation of Powers?

The congress created an office of Clerk and assigned duties. The statute is fine.

The problem arises from reading into that statute authority that was never there. The language defines no decision-making authority whatsoever. *Cf.* § 631 *with* § 639. The duties don't include ***judicial*** decision-making of *any* kind. Key, ***non-judicial*** decision-making doesn't happen without unanimous consent of the parties. *Gonzalez.*

3. Does 28 U.S.C. § 956 violate Due Process or Separation of Powers?

The congress clarified the relationship between court and clerk(s). The statute is fine.

The problem arises from reading into that statute authority that was never there. No "judge" or "court" may delegate ***judicial*** power, to *any*one, at *any* time, by *any* mechanism, for *any* reason. ***Non-judicial*** decision-making doesn't happen without unanimous consent of the parties. *Gonzalez.*

4. Does FED. R. APP. P. 27(b) violate Due Process or Separation of Powers?

FED. R. APP. P. 27(b) purports to grant *procedural* decision-making authority to the clerks. Since there is no such authority in the office, this concept challenges Separation of Powers to the hilt. It's clear that the congress never intended clerks to make *judicial* decisions, not even procedural ones.

Without setting aside that objection, but looking

at the rule-making process, it's conceivable that this Rule is legit. Starting there and working backwards, there is a possible justification: recognize the clerical staff as "alternative decision-makers". While the office doesn't permit such, it doesn't overtly prohibit such, either. The clerks are available, and there may be substantial cost savings.

Just the same, no procedural rule creates an office or subject matter jurisdiction. Thus, if such "alternative decision-makers" have signature authority, at all, it's by one and only one mechanism: unanimous consent of the parties. *Gonzalez.*

RJF does not presume this Rule valid, in any way, shape, manner, or form. Procedural rules do not create or expand subject matter jurisdiction. But, even if we presume the Rule valid, it's an Evel Knievel Grand Canyon jump to get to *from* the existence of the Rule *to* clerical decision-making authority *over* at least one party's objections.

5. Does 5TH CIR. R. 27 violate Due Process or Separation of Powers?

See Question 4. The only way any appellate court's rule is valid, at all, is if the uniform federal rule is valid, and RJF greatly questions Rule 27(b). The appellate court's Rule 27 exacerbates the same problem magnificently.

If Rule 27(b) passes muster, it follows that Rule 27 would also. Still, we're looking at Evel Knievel's Grand Canyon jump as the perfect analogy as to *when* clerical decision-making over any party's objection is in any way lawful. *Gonzalez.*

Compelled consent.

6. Does an appellate (deputy) clerk have decision-making authority, at all?

Just compare the oaths of office.

Cf. § 453 *with* § 951. No appellate court clerk takes even a feigned oath to abide by the laws of the United States. Why not? Because the congress never intended for § 711 and § 956 clerks to be decision-makers! *But see* Rule 27(b).

Compare the duties contemplated.

If the congress intended for clerks to be decision-makers, then surely they would spell out the scope of such authority. *Cf.* § 631 *and* § 636 *with* § 711 *and* § 956. As clearly as magistrates *are* designed to be alternative decision-makers, appellate court clerks *are not*.

By consent only.

The (deputy) clerks are not § 451 "judges". Thus, presuming a reason exists for the Rules that even *contemplate* clerical decision-making, if clerks have signature authority to enter rulings, at all, *see* Rule 27(b), it would be "by consent only". *Cf. Gonzalez.*

7. If so, what besides unanimous consent provides that authority?

Nothing. *Gonzalez* ("If the parties consent").

8. May the appellate court compel consent to non-judicial decision-making?

No! *Gonzalez* ("If the parties consent").

Denial of Access, Witness tampering, etc.

9. Do the appellate court's sanctions violate Due Process?

"Taxpayer" Means "Fiduciary".

"Dollar" is not presently defined as a "weight" of anything. 31 U.S.C. §§ 5101, 5102, 5103. Therefore, the foundational choice of law is the Law of the Sea, not the Law of the Land. The Law of the Sea applies *when agreed to*. *Cf. Planters' Bank* ("government" as proprietor); *Ogden* (choice of law is an element/term of the agreement).

This is reinforced with tungsten carbide rebar by the "secret" lien policy/process used by the irs. "Secret" liens don't exist on paper; they arise/exist as a matter of law. *Cf. Mr. Dean.* [6] For this reason, the irs agents don't file "Liens"; they file "**Notices of** (otherwise "secret") Liens". *See Vance* (perhaps the first case confirming that a "secret" lien is not enforceable without Notice).

Liens perfect and attach for tort claims just as easily as for agreement claims. But USOA/U.S. do not assert personal injury or physical property damage when they assert an "income tax" claim. That leaves agreement-based claims.

Even more clearly, for purposes of "debt collection", "debt" includes "tax", 28 U.S.C. § 3002(3)(B), and "United States" means "a Federal corporation", 28 U.S.C. § 3002(15)(A). Again, *see Planters' Bank* ("government" as proprietor). What gives rise to debts? Judgments and agreements. USOA/U.S. do not base "income tax" claims on

[6] How can "the fifth" understand this so well but ***nothing*** related to it?

judgments. That leaves agreements, once again.

Agreements come in two generic types: contracts and trusts. No one goes to jail for mere breach of contract. That leaves trusts. *Cf. Pollock I*, 157 U.S. at 553-54 (concern over being "guilty" of "breach of trust" due to one non-consenting beneficiary).

In sum, RJF, as just one of the **"taxpayer" means "fiduciary"** litigants, has been sanctioned for arguing the very law "the fifth" swore to uphold!

Magistrates participate "BY CONSENT ONLY". *See Gonzalez.*

Due Process.

To sanction a party for arguing the law is to deny access. Whether we call it denial of access, *see Harbury*, or unequal protection, *see, e.g., Village of Willowbrook* (intentional, irrational, reproducible governmental action; "class of one" recognized), "the fifth" have relished in violating RJF's rights, wantonly, intentionally, criminally, repeatedly (this is at least the third time), and with deliberate indifference, by compelling him, via unconsented-to clerical decision-making, i.e., Sedition, to show cause why his appeal shouldn't be dismissed.

Crimes committed.

E.g., denial of access, infringement with the right (not) to contract, with the right to meaningful "hearing", with the right to structural Due Process (separation of powers), witness-tampering, retaliation, Record-tampering (participation by unconsented-to non-judicial decision-makers), Sedition, Treason, and conspiracy.

Thus, *see* § 455(a); *Liljeberg*.

While there is no "constitutional right" to an

appeal, *Abney*, there *are* appeals because the *statutes* grant that right. *Id.* The granting of a right, or privilege, can't be denied or withdrawn willy-nilly. *Cf. Crawford* (evidentiary privilege can't be granted generally and then reneged as the winds blow).

On top of that, RJF animated solely the Proper Capacity throughout No. 05-60552. Thus, where's the evidence of anything sanctionable?

Service of Process

10. May a defendant lawfully avoid process by refusing to accept mail the defendant knows is the Summons and Complaint?

Avoiding *federal* process is a crime.

See 18 U.S.C. § 1501 (obstructing) (misdemeanor); § 1506 (feloniously avoiding process) (5-yr felony); § 1512(b)(1) (influencing a witness not to testify, and its conspiracy) (10-yr felony); § 1512(b)(2)(A) (withholding testimony, and its conspiracy) (10-yr felony); § 1512(b)(2)(C) (evading legal process for witness and its conspiracy) (10-yr felony); § 1512(b)(2)(D) (being absent from official proceeding to which one has been summoned, and its conspiracy) (10-yr felony). Key to the federal statutes is "knowing" what the matter is about. All eight of these Service avoiders/obstructors "knew" ***exactly*** what the mail contained.

DAVIS is confused, again. *STATE's* laws tolerate limited avoidance.

See PENAL CODE § 38.16 (intentionally preventing execution of process in civil case; exception – avoiding detection) (Class C misdemeanor). Thus,

where DAVIS is "right" that the *Texas* statute allows "avoiding detection", *cf. Proulx* (multiple efforts at Service took several months; delay justified), he's dead wrong about the *federal* statutes, which don't tolerate ***at all*** what he advised these people to do.

11. Did BOYLE abuse discretion by refusing to allow more time for Service?

Manifestly!

See Question 10.

RJF's motions allowed each of the avoiders the opportunity to repent. Each knew ***exactly*** what was in the mail, yet each continued to avoid Service. They can't be heard to benefit from their (additional, perpetual, incessant, etc.) criminal conduct. "The principle that a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our jurisprudence". *Perma Life Mufflers, Inc.* 392 U.S. at 151 (anti-trust context). BOYLE cannot *lawfully* deny RJF the additional time he needed to serve these habitually criminal defendants. *Cf. Proulx* (state court; multiple efforts at serving process took several months; delay justified).

Crimes committed.

By aiding and abetting the criminal avoidance of Service, BOYLE also commits theft of RJF's chose in action relevant to each Service avoider.

Signature authority—trial court

12. Did BOYLE err by referring this case, in any part, to a magistrate?

Gonzalez.

Immunity for criminal conduct?

13. Did BOYLE err by dismissing RJF's claim(s) against each of the following:

Conspiracy, combination, and aiding and abetting.

RJF charges all defendants as conspirators, as members of the combination, and as aidors and abettors, in and with all the crimes committed by any member of the conspiracy. The crimes identified are generally those committed directly by that individual or group of individuals. In short, the example charges are not exclusive or exhaustive.

Governmental liability – duty/failure to train.

"[A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officer with specific tools to handle recurring situations." *Brown*, 520 U.S. at 409. None of the "judges", the "attorneys", the "clerks", the "magistrates", or the "investigator(s)" is properly trained. [7] In the "tax" area, there's an overt profit motive. In the area of non-judicial decision-making, there's a docket-management motive. In the area of malicious prosecution, there's no training whatsoever on the limits of STATE's Penal Code. In all circumstances, none of these professionals is going to readjust his/her paradigm because a *pro se* shows up speaking a strange language, i.e., the law of "this state". It's precisely because the law they've sworn oaths to uphold IS strange to them that we recognize

[7] One has to wonder, though, how much training is necessary to realize that STATE had judicially confessed having "no case" via its Star Chamber episode by confessing that the "Notice of Lien" "IS NOT" a claim on property.

instantly how **deliberately** incompetent the "professional" training actually is.

COUNTY and STATE are manifestly liable for their failure to train.

USOA/U.S. are manifestly liable for their failure to train.

No immunity for criminal conduct.

Bivens; *O'Shea*, 414 U.S. at 503; *Gravel*, 408 U. S. at 627; *Harlow*, 457 U.S. at 809-11, 813-19 (citing *Gravel*, immunity protection extends no further than its justification warrants; acts must still come *within* the scope of the *authorized* discretion); *Lanier*, 520 U.S. at 270-71. *Cf.* 42 U.S.C. § 1983.

No immunity for conduct outside the scope of jurisdiction.

Cf. Halsey (absolute immunity protects discretion exercised ***within*** the scope of jurisdiction); *Pierson* (citing *Bradley*) (same).

No immunity for bad faith.

See generally, David B. Sweet, Annotation.

No probable cause. *See, e.g., Redding*.

No immunity for commercial activity.

Cf. Planters' Bank ("government" as proprietor)

"Income tax" matters are commercial. The "Notice of Lien" matter was/is commercial. "Transportation" matters are commercial matters. To act commercially is to waive immunity.

Applicable federal criminal statutes, Title 18.

§§ 241, 242, criminal violation of rights under color, individually and in conspiracy

§ 371, conspiracy to violate law of the United States

§§ 661, 662, taking and carrying away, and/or

receiving stolen property

§§ 872, 876, 880, extortion by agent or office of United States and receiving the proceeds from extortion

§ 1001, making false statements, using false documents

§ 1201, kidnapping

§§ 1341, 1349, mail fraud and its related conspiracy

§ 1512(b), (c), (k), witness tampering and its related conspiracy

§ 1513(b), (e)[2], retaliation (where "damages" includes "theft of") and its related conspiracy

§ 1513(e)[1], (e)[2], retaliation and its related conspiracy

§ 1519, falsification of records in administration of this matter

§ 1951, racketeering-level extortion

§ 1956, money laundering

§§ 1962, 1963, RICO-level criminal activity and its related conspiracy

§ 2071, criminal Record-tampering

§§ 2314, 2315, interstate transfer of stolen property, receipt of stolen property

§ 2381, Treason (non-death-penalty variety)

§§ 2384, 2385, seditious conspiracy, use of "force" to overthrow the Government

Applicable provisions of the Penal Code.

§ 7.01(a), (b), (c), parties to offenses

§ 7.02(a)(1), (a)(2), (a)(3), (b), criminal responsibility for conduct of another, aiding and abetting

§ 7.03(1), (2), defenses excluded

§ 7.21(1), (2)(A), (2)(B), (2)(C) ("Agent", "High

managerial agent")

§ 7.22(a)(1), (a)(2), (a)(3), (b)(1), (b)(2), criminal responsibility of corporation or association

§ 7.23((a), (b), (c), criminal responsibility of person for conduct in behalf of corporation or association

§ 7.24, defense to criminal responsibility of corporation or association

§ 15.01, attempt

§ 15.02. conspiracy

§ 20.01(1)(A) ("restrain")

§ 20.02(a), (d), unlawful restraint

§ 28.03, criminal mischief

§ 31.01, definitions relevant to theft offenses

§ 31.02, consolidation of theft offenses

§ 31.03. theft

§ 32.32(b), (c)(4), false statement to obtain property (or credit)

§ 32.48, simulating legal process

§ 36.03, coercion of public servant (or voter)

§ 36.05, tampering with witness

§ 36.06, obstruction or retaliation

§ 37.01, definitions

§ 37.02, perjury

§ 37.03, aggravated perjury

§ 37.04 ("materiality")

§ 37.09, tampering with physical evidence

§ 37.10, tampering with governmental record

§ 39.01, definitions

§ 39.02, abuse of official capacity

§ 39.03, official oppression

§ 71.01(a), (b), (c), (d) ("combination", "conspires to commit", "profits", "criminal street gang")

§ 71.02(a)(8), enhancement for any felony offense under Chapter 32

§ 71.02(a)(9), enhancement for any offense under

Chapter 36

§ 71.02(a)(13), enhancement for any offense under section 37.10

§ 71.022, soliciting membership in a criminal street gang

§ 71.03, defenses excluded

§ 71.05, renunciation defense

a. SCHELL

E.g., retaliation, witness tampering, Record tampering, false statements, [8] mail fraud, denial of access, compelled contracts, Treason, Sedition, and the related conspiracies.

b. EASTERN DISTRICT OF TEXAS

Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction).

c. BUSH

Conspirator with SCHELL.

d. MALAND

Conspirator with SCHELL.

e. KING
f. SMITH
g. WIENER, JR.
h. GARZA
i. CLEMENT
j. PRADO
k. DEMOSS

E.g., denial of access, compelled contracts, witness tampering, retaliation, Record tampering,

[8] RJF is aware of *Hubbard*.

false statements, mail fraud, extortion, Sedition, Treason, and the related conspiracies. If the "tax court's" sanctions are ever *collected*, then add money laundering.

l. **FIFTH CIRCUIT**

Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction).

m. **COLVIN**
n. **COHEN**
o. **MORRISON**
p. **VASQUEZ**
q. **DITROLIO**

E.g., Denial of access (trial and appellate), denial of Due Process, retaliation, witness tampering, Record tampering (including taking and carrying away), false statements, mail fraud, extortion, Treason, and the related conspiracies. If the sanctions are ever collected, add money laundering.

r. **TAX COURT**

Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction).

s. **SHULMAN**
t. **ROTHENBERG**
u. **SHEEHAN**
v. **KORB**
w. **POTTER**
x. **THOMAS**
y. **BENFORD**
z. **GARBER**
aa. **FLICK**

E.g., retaliation, witness tampering, false statements, mail fraud, extortion, Treason, and the related conspiracies. If the sanctions are ever *collected*, add money laundering.

bb. RUSCH

E.g., conspirator with DAVIS, no jurisdiction, Star Chamber (no Notice), witness tampering, denial of access, theft, criminal mischief, abuse of official capacity, official oppression, and the related conspiracies. *See also* Question 10.

cc. BARRY

E.g., conspirator with DAVIS, no jurisdiction, no Notice, witness tampering, denial of access, theft, kidnapping, unlawful restraint, retaliation, record tampering, abuse of official capacity, official oppression, and criminal denial of Due Process. *See also* Question 10.

dd. DAVIS

E.g., in addition to libel/slander, conspiracy to violate rights, conspiracy (federal and state), making false statements, using false documents, kidnapping (conspirator), mail fraud, extortion, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, false statements to obtain property, simulating legal process, coercion of public servant, soliciting membership in a criminal street gang. DAVIS has no intention of renouncing.

ee. MATTHEWS, STEIN, etc.

Conspirator with DAVIS. Corporate liability for acts of its agents.

ff. TAYLOR

E.g., conspirator with DAVIS, libel/slander, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, false statements to obtain property, and simulating legal process.

gg. ROACH

E.g., conspirator with DAVIS, libel/slander, [9] malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, false statements to obtain property, and subornation of perjury. *See also* Question 10.

hh. WESTERFELD

E.g., conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record

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[9] For "expert" testimony, the prosecution called DAVIS, who then proceeded to libel/slander RJF one more time in the capacity of the "expert" witness.

tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, false statements to obtain property, and subornation of perjury. *See also* Question 10.

ii. MILLER

E.g., conspirator with ROACH, witness tampering and extortion.

jj. RICHARDSON

E.g., conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, false statements to obtain property, and subornation of perjury. *See also* Question 10.

kk. SOLOMON

E.g., conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, false statements to obtain property, and subornation of perjury. *See also* Question 10.

ll. YOON KIM

E.g., conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, and false statements to obtain property.

mm. FREDERICKS

E.g., conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, and false statements to obtain property. *See also* Question 10.

nn. SMITH

E.g., (the "investigator"), conspirator with ROACH, malicious prosecution, conspiracy to violate rights, conspiracy (federal and state), kidnapping (conspirator), mail fraud, witness tampering, theft, retaliation, record tampering, RICO (and its conspiracy), Treason (and its conspiracy), abuse of official capacity, official oppression, extortion, and false statements to obtain property.

oo. COLLIN COUNTY

E.g., conspirator with DAVIS (thus also ROACH). Corporate liability for the acts of its agents acting

commercially (i.e., beyond their jurisdiction). COLLIN COUNTY's policy through this ordeal was to be, at best, deliberately indifferent to the defiance of law when it comes to RJF. Duty/failure to train. *See also* Question 10.

pp. PATTEN

E.g., conspirator with TAYLOR, thus DAVIS, record-tampering, witness-tampering, conspiracy to violate rights, conspiracy (state and federal), denial of access (trial and appellate), deliberate indifference to the very clear and plain policy that motions for new trial are filed when submitted, with or without the associated filing fee. PATTEN, like BROCATO, used his office to aid and abet the Collin County Clerk's Office's criminal Record-tampering activity in No. 001-1412-05.

qq. MIMS

E.g., as PATTEN's "attorney" in No. 3:07-CV-125-M (ND TX, Dallas), conspirator with PATTEN, thus with TAYLOR, thus with DAVIS, Record-tampering, witness-tampering, conspiracy to violate rights, conspiracy (state and federal), and making and using materially false documents.

rr. CITY OF PLANO

E.g., conspirator with PATTEN and MIMS, thus with DAVIS/TAYLOR. Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction). CITY's policy through this ordeal was to be, at best, deliberately indifferent to the defiance of law when it comes to RJF. Duty/failure to train.

ss. STEVENSON

E.g., no jurisdiction, *ex parte* motion(s) and ruling(s) with PATTEN during the active case against RJF's daughter, and then presided over the "Failure to Appear" charge for which he was effectively the complaining witness. Originally associated with the "Failure to Appear" charge was a $500 fine. That compelled appeal (trial *de novo*), which produced the "Not Guilty" decision, which is the favorable decision on which the associated malicious prosecution case arises.

tt. PLANO MUNICIPAL COURT

See STEVENSON. Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction).

uu. JP COURT, PRECINCT 3, PLACE 1

The JP COURT, continued to assert jurisdiction in the matter over which it had none, out of pure harassment and deliberate disregard of the law, to perpetuate the extortionate demands made by STATE, via the issuance of a ticket (typical fine $117) for non-display of the registration sticker ***after*** confirming by computer that the fees had been paid. The JP COURT exasperated and perpetuated STATE's act of (attempted) theft.

vv. BROCATO

E.g., conspirator with PATTEN, thus DAVIS/ TAYLOR, conspiracy to deny rights, denial of access (trial and appellate), and conspiracy (state and federal). Acting with deliberate indifference,

BROCATO intended to aid and abet, and to conspire, to assist in the Record-tampering clerks' avoidance of prosecution for their criminal conduct.

ww. FIFTH DISTRICT

E.g., falsified at least one appellate Record, No. 05-08-01301-CR, reciting plainly false facts in a ruling it then refused to withdraw, and has aided and abetted the crimes committed by BARRY and the DA's Office in No. 002-81328-06.

xx. STATE

Corporate liability for the acts of its agents acting commercially (i.e., beyond their jurisdiction). STATE has aided and abetted by failing and/or refusing, with deliberate indifference, wantonness, callous disregard, and etc. to teach its officers the law and to teach the law to the attorneys its licenses. For those failures/refusals, STATE has made itself an active player in the conspiracy against RJF, rendering STATE jointly and severally liable for the entire amount of damages.

yy. U.S.
zz. USOA

E.g., to date, USOA/U.S. have proceeded with deliberate indifference to the flagrant criminality being committed by SCHELL, and the others in ED TX, against these *pro se* parties, by the "tax court", by "the fifth", by ND TX, and by all defendants who have violated federal criminal statutes. USOA/U.S. has a duty to train its "judges", "magistrates", "clerks", and "prosecutors".

14. Did BOYLE err by declining to award declaratory relief?

a. Does the (magistrate) Consent form violate Due Process?

As documented in all local rules relevant to the issue, ND TX boldly and openly defies *Gonzalez*. They couldn't care less about party consent on the issue of pre-trial magistrate participation. They're not the only district court with that attitude.

b. Does ND TX R. 16.2 violate Due Process and/or Separation of Powers?

See Question 14.a. Within the legislatively set scope of authority of the office of magistrate, what the magistrate may or may not do is up to the ***parties***, *not* the presiding judge.

c. Does Special Order No. 3-251 violate Due Process?

See Question 14.a. Per this "order," a case may be "referred" (1) by the clerk, (2) upon filing of the case, (3) without any other fact-finding or order by the assigned judge, etc.

d. Do Misc. Order No. 6 and its supplemental Special Order 2-59 violate Due Process?

See Questions 4, 5, 6. "Rule 3" (1982), if applied ***at filing***, would come close to matching *Gonzalez*.

e. Is BUCHMEYER's sanctions "order" null and void?

In No. 3:07-CV-125-M (ND TX, Dallas), BUCHMEYER, now deceased, sanctioned RJF as a Removing **plaintiff**, setting the amount in an "order" that correctly identified RJF as the ***defendant!***

f. Do Tax Court Rules (TCRs) 182, 183, 70(a)(1), 90(a), 120, and 121 violate Due Process?

TCR 182.

Even after *Ballard*, *Gonzalez*, and amendment, TCR 182 ***still*** (A) puts the decision of STJ participation exclusively in the hands of the "chief judge" not the parties, *see* TCR 182(d), and (B) has the STJ report to the "chief judge" not to the Record, per TCR 182(c).

TCR 183.

Despite *Gonzalez*, TCR 183(a) still compels consent to STJ participation.

Despite *Ballard*, TCR 183(b) still has the STJ report to the "chief judge" not to the Record.

Despite *Ballard*, the "tax court" still makes "secret" "referral" "orders". Since the ***only*** "tax court" officer that any litigant can expect to participate is the "chief judge", even the "referral" to a "judge" must be made of Record. TCR 183(b), (c), and (d) still allow "referral" "orders" to be "secret", as in, never filed of Record.

TCRs 70(a)(1) and 90(a).

In exactly the same way that comm'r controls all summary judgment activity in the "tax court," comm'r also controls all discovery activity. Discovery

can't start until 30 days after "joinder". *See* TCR 38.

TCRs 120 and 121.

FED. R. CIV. P. 56 has no condition precedent, but TCRs 120 and 121 do. There must be "joinder". TCR 38. Thus, comm'r unilaterally controls all summary judgment activity in "tax court".

g. Does TCR 91 violate public policy?

Via TCR 91, the "tax court" asserts the authority to compel ***stipulations***. Consent cannot be compelled. *Rudzewicz* (jurisdiction doesn't flow from fraud, undue influence, or overwhelming bargaining power); *Ohralik* (undue influence in legal services environment, in particular); *Bates* (along the same line; focus on legal services ads); *Escobedo*; *Miranda*; FED. R. CIV. P. 8(c); *Ballard* (local rules don't justify (criminal) Due Process violations); § 636(a), (c) ("by consent only"); *Gonzalez* ("If the parties consent") (construing § 636(**b**)); *Boddie* (denial of access); *Harbury* (study of denial of access claims).

h. Does irc § 7443A(c) violate Due Process?

The conceptual origin of the problems with TCRs 182(d) and 183(a) is § 7443A(c), which purports to put in the hands of the "chief judge" the authority to allow the STJ to make the decision of the court.

That's ***not*** the "chief judge's" call to make. The scope of STJ participation is governed by the consent of the parties. Period. *Gonzalez*. Since the office of STJ has the authority to enter the decision of the court, the "chief judge's" interference on that issue sounds more in tortious interference, compelled consent, and criminal Record-tampering than Separation of Powers.

i. Do TEX CRIM. PROC. CODE arts. 4.03 and 45.0215 violate Due Process?

Art. 4.03.

This provision establishes the "$100 tyranny allowed zone".

Art. 45.0215.

This provision establishes that the parent is a party to the proceeding. The state courts don't treat the parent as a party.

j. Do TEX. RS. APP. P. 25.2(a)(2) and 25.2(d) violate Due Process?

While recognizing the right to appeal, it's limited by the existence of the certificate, the production of which is completely beyond the control of the defendant, i.e., the party to be "punished", if it's not produced.

k. Did STATE's appellate court ever have authority to enter the "ruling" in No. 05-08-01301-CR, much less fabricate the facts on which that "ruling" is based?

RJF initiated a collateral order doctrine appeal in the county court from the JP court's refusal to apply Art. 45.018(b). RJF sent a complimentary copy of that appeal to the appellate court. The "ruling" in 1301 recites a final ruling, but there was no final ruling in the JP court. The trial date hadn't even arrived as of the date of the ruling in 1301. The appellate court refused to correct ruling, which is based both on fabricated facts and on jurisdiction that didn't exist; there was no county court ruling.

l. Is RUSCH's "ruling" in Misc. No. 401-02217-06 void?

Not only did RUSCH proceed in Star Chamber, *see, e.g.*, *Peralta*, but also that "ruling" "finds" that the "Notice of Lien" at issue "IS NOT" a claim on property. That finding instantly terminates the entire matter. GOV'T CODE §§ 51.901, 51.903. Moreover, STATE, the clandestine plaintiff, never had standing. *Sunset Valley*, 146 S.W.3d at 646; *TX Dept. of Parks & Wildlife*.

m. Is irs Notice 2008-14, which purports to justify administrative sanctions for arguing "taxpayer" means "fiduciary", **extortionate and/or otherwise defiant of Due Process?**

See Question 9.

More criminal conduct

15. Did BOYLE abuse her discretion by sanctioning RJF?

"[A] court by definition abuses its discretion when it makes an error of law." *Philippines*, 128 S. Ct. at 2189 (internal quotes omitted) (citing *Koon*, 518 U.S. at 99-100.

RJF's multiple claims at law, in equity, and sui generis are valid, and BOYLE applied "the fifth's" policy of sanctioning the *pro se* who demands that the law be recognized and followed. She has added herself, RAMIREZ, and MITCHELL to the ever-growing list of conspirators. It was error to dismiss, at all, much less to add punitive sanctions for asserting the right of redress.

16. On reinstatement, should BOYLE be instructed not to participate?

By rewarding blatant criminal violations in this very case, e.g., criminal avoidance of the process server, by sanctioning RJF for arguing the law and demanding compensation for the crimes committed against him, and for denying his access and compelling him to consent to non-judicial decision-making, BOYLE literally signed up as a new member of the conspiracy sued here. A judge who criminally violates the litigants before her is conflicted off that case. *See* § 455(a); § 455(b)(1), (b)(4); *Liljeberg*; *Liteky* (the "smell test"; objectively, how does it appear?). Borrowing from the state court cases, since BOYLE has made herself a conspirator, she now has an "interest" in the outcome of the case. *Caperton*; *Aetna Life Ins. Co.*; *Ward*; *Mayberry*; *In re Murchison*; *Tumey*.

Remedies and Relief Requested

Given the foregoing, RJF requests relief as follows:

1. Grant this petition, issue the writ of certiorari, and take jurisdiction;
2. Confirm that any non-judicial decision-making happens, if at all, only by unanimous consent of the parties, both at trial and on appeal;
3. Vacate or otherwise overrule No. 05-60552 (Florance) and No. 07-40129 (RJF), at least in part;
4. Explain how FED. R. APP. P. 27(b) and 5TH CIR.

R. 27 pass muster, i.e., don't offend Separation of Powers;

5. Strike all clerk-"signed" "orders" on appeal;

6. Formally reconfirm that the distinction between published and unpublished rulings is still quite valid and that unpublished (private, as in "WL"-accessible-only) rulings are relevant between those parties and not in or for any other case, unless asserted by at least one party and consented to by all other (relevant) parties;

7. Remand for briefing, etc., and ruling on the merits of this appeal; and, if at all possible, assign one or more members of this Court to that panel, or else derive a panel from one or more circuits other than "the fifth";

8. If the merits may already be reached,

   A. reinstate the case;

   B. Vacate BOYLE's dismissals of the eight defendants who avoided the process server;

   C. Strike BOYLE's "referral" "order" for lack of signature authority;

   D. Strike all "orders" by the unconsented-to magistrate due to lack of signature authority;

   E. Vacate BOYLE's dismissal of the remaining defendants, whether due to the participation by the unconsented-to non-judicial decision-making, or other reason(s);

   F. Establish a board of inquiry to investigate all the criminal conduct engaged by these "courts", "judges", "magistrates", and "clerks" against the litigants before them, especially the *pro se*

litigants, and engaged by all these "attorneys" against their opposing parties, especially the *pro se* parties;

G. Allow demonization via the term "terrorist" only where there's at least a scintilla of evidence of the demonized party's violent, murderous, politically-motivated acts and intent;

H. Strike the (magistrate) Consent form;

I. Strike ND TX R. 16.2;

J. Strike Special Order 3-251;

K. Strike Miscellaneous Order No. 6 and its supplemental Special Order 2-59;

L. Strike BUCHMEYER's sanctions "order";

M. Strike TCR 182;

N. Strike TCR 183;

O. Strike TCR 70(a)(1);

P. Strike TCR 90(a);

Q. Strike TCR 120;

R. Strike TCR 121;

S. Strike TCR 91;

T. Strike irc § 7443A(c);

U. Strike TEX CRIM. PROC. CODE art. 4.03;

V. Regarding Art. 45.0215, clarify when a parent is a summoned party to the proceedings involving a minor;

W. Strike TEX. RS. APP. P. 25.2(a)(2) and 25.2(d);

X. Compel the state appellate court to withdraw its "ruling" in No. 05-08-01301-CR;

Y. Declare the "final" "judgment" in Misc. No. 401-02217-06 void;

Z. Declare irs Notice 2008-14 void in that part that allows administrative sanctions for arguing that "taxpayer" means "fiduciary"; and

AA. On reinstatement, include instructions that BOYLE shall not participate.

In addition, RJF requests

9. The opportunity to brief any additional issues the Court may identify;
10. The non-argument calendar;
11. Costs; and
12. Any and all relief at law, in equity, or sui generis to which he may show himself justly entitled.

Respectfully submitted,

/s/ Richard John Florance, Jr.
Richard John Florance, Jr.

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2010 Sep 30—Clerical "order" of dismissal

Case: 10-10803 Document: 00511249873 Page: 1
Date Filed: 09/30/2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-10803

RICHARD JOHN FLORANCE, JR., Individually and as Next Friend for A.F., A Minor [1]

Plaintiff - Appellant

v.

[2] DON BUSH; DAVID J MALAND; CAROLYN DINEEN KING; JERRY E. SMITH; JACQUES L. WIENER, JR.; EMILIO M. GARZA; EDITH BROWN CLEMENT; EDWARD C. PRADO; HAROLD R. DEMOSS, JR.; JOHN O COLVIN; MARY ANN COHEN; RICHARD T. MORRISON; JUAN ANTONIO VASQUEZ; ROBERT R. DITROLIO; UNITED STATES TAX COURT; ANTHONY T. SHEEHAN; DONALD L KORB; CLARISSA C POTTER; THOMAS R. THOMAS; GARY A BENFORD; ABBEY B GARBER; ADAM L. FLICK; JERRY BUCHMEYER; MATTHEWS, STEIN, SHIELS, PEARCE, KNOTT, EDEN & DAVIS LLP;

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[1] [N.B. *But see* Amend. Compl. *RJF*]

[2] [N.B. *But see* Orig. and Amend. Compl. and Counter-Counter-claim. *RJF*]

ROBERT J DAVIS; BRENDA TAYLOR; COURTNEY MILLER; YOON KIM; CHAD SMITH; RODNEY D PATTEN; PAIGE MIMS; ANTHONY G BROCATO; CITY OF DALLAS, TEXAS; CITY OF PLANO TEXAS; JP COURT, PRECINCT 3, PLACE 1, DALLAS COUNTY; DON STEVENSON; PLANO MUNICIPAL COURT; FIFTH DISTRICT COURT OF APPEALS; STATE OF TEXAS; UNITED STATES; UNITED STATES OF AMERICA; RICHARD A. SCHELL; UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS; UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT; DOUGLAS SHULMAN; GILBERT ROTHENBERG,

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

[⊥ 2]

Case: 10-10803 Document: 00511249873 Page: 2 Date Filed: 09/30/2010

CLERK'S OFFICE:

Under 5th Cir. R.42.3, the appeal is dismissed as of September 30, 2010, for want of prosecution. The appellant failed to timely comply with this court's notice of 8/18/10.

Clerk of the United States Court of Appeals for the Fifth Circuit

By: /s/ *Madeline Chigoy*
Madeline K. Chigoy, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

Rule 14.1(i)(ii)—Additional Orders

Appellate court

No. 10-10803 (this case)

2010 Aug 18—Clerical "show cause order" denying access

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 18, 2010

Mr. Richard John Florance Jr.
1908 Vassar Drive
Richardson, TX 75081-0000

No. 10-10803, Richard Florance, Jr. v. Don Bush, et al
USDC No. 3:09-CV-1470

Our records reflect that in case number 05-60552, Florance v CIR, the court sanctioned and barred you from filing any pro se appeals without the advance written permission of this court. You have thirty (30) days to submit a motion for permission to proceed as a sanctioned litigant. If you fail to comply we will dismiss this appeal without further notice. Forthcoming submissions other than a motion for permission to proceed will be neither addressed nor acknowledged.

Sincerely,

LYLE W. CAYCE, Clerk

By: */s/ Madeline Chigoy*
Madeline K. Chigoy, Deputy Clerk
504-310-7691

cc: Ms. Madeleine B. Connor
Mr. Robert Jacob Davis
Mrs. Carol M. Garcia
Mr. Peter L Harlan
Ms. Paige Mims
Mr. James Bickford Pinson
Mr. Joseph A Pitzinger III

DKT1

No. 10-10057 (recent 90-day letter case) (became No. 09-1181)

2010 Mar 2—Clerical "order" of dismissal

United States Court of Appeals
Fifth Circuit
FILED
March 2, 2010

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-10057

RICHARD JOHN FLORANCE, JR.,
Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

---

CLERK'S OFFICE:

Under 5th Cir. R.42.3, this case is dismissed as of March 2, 2010, for want of prosecution. The

appellant failed to timely comply with this court's notice of January 26, 2010.

Clerk of the United States Court
of Appeals for the Fifth Circuit

By: */s/ Renee McDonough*
Renee S. McDonough, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

2010 Jan 26—Clerical "show cause order" denying access

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

January 26, 2010

Mr. Richard John Florance Jr.
1908 Vassar Drive
Richardson, TX 75081-0000

No. 10-10057, Richard Florance, Jr. v. USA
USDC No. 3:09-CV-1732

Our records reflect that in case number 05-60552 and 07-40129 , Florance v. CIR and In Re: Florance, et al , the court sanctioned and barred you from filing

any pro se appeals without the advance written permission of this court. You have thirty (30) days to submit a motion for permission to proceed as a sanctioned litigant. If you fail to comply we will dismiss this appeal without further notice. Forthcoming submissions other than a motion for permission to proceed will be neither addressed nor acknowledged.

CHARLES R. FULBRUGE III, Clerk

By: */s/ Renee McDonough*
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:
Mr. Joseph A Pitzinger III

No. 07-40129 (Removal, "ticket" cases)
(unconsented-to magistrate participation)

2007 Jun 5—"Order" striking/dismissing Mandamus, denying access

U.S. COURT OF APPEALS
F I L E D
JUN 0 5 2007
CHARLES R. FULBRUGE III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-40129
USDC No. 4:06-CV-178 &
USDC No. 4:06-CV-459

IN RE: AMANDA JEAN FLORANCE; RICHARD JOHN FLORANCE, JR.,

Petitioners.

- -

Petition for a Writ of Mandamus or Prohibition
to the United States District Court
for the Eastern District of Texas

- -

Before JOLLY, STEWART, and PRADO, Circuit Judges.

PER CURIAM:

Amanda Jean Florance and her father, Richard John Florance, Jr., have filed in this court a pro se petition for a writ of mandamus or prohibition. They state that the "real parties in interest" are Eastern District of Texas District Judge Richard A. Schell, Magistrate Judge Don D. Bush, and Clerk of Court David Maland.

The petitioners seek relief concerning two district court cases, 4:06-cv-178 and 4:06-cv-459. Both cases were removed from state courts to the federal court by one or both of the petitioners, and both have since been remanded. Petitioner Amanda Florance has appealed in 4:06-cv-178, and the case is in briefing stages. The district court docket sheet reflects that [⊥ 2] Richard Florance submitted an appellate filing

fee in 4:09-cv-459, but our docket shows no indication of an appeal from that case.

The Florances' mandamus petition is replete with inappropriate, scurrilous, abusive, and contumacious language concerning Judges Schell and Bush and Clerk Maland. Among other relief, the petitioners seek "delay damages" from Judge Schell and request that Judges Schell and Bush and Clerk Maland be censured or sanctioned. The first 23 pages of the petition are signed only by Amanda Florance, although Richard Florance's name is typed below her name. Amanda Florance has signed her name to an additional ten pages setting out "counts," as in a criminal indictment, directed at the activities of Judges Schell and Bush and Clerk Maland. Richard Florance signed his name to three more pages setting out an additional five "counts."

Although pro se litigants are entitled to liberal construction of their pleadings, we "will not allow liberal pleading rules and pro se practice to be a vehicle for abusive documents." Theriault v. Silber, 579 F.2d 302, 303 (5th Cir. 1978) (Theriault II). Any complaint the petitioners have about the conduct of Judges Schell and Bush and Clerk Maland could "be adequately addressed in a civil manner" in their pleadings. See id. Because of the insulting nature of the mandamus petition, we strike it. Cf. Theriault v. Silber, 574 F.2d 197, 197 (5th Cir. 1978) (Theriault I) (granting appellee's motion to strike notice [⊥ 3] of appeal and dismiss appeal due to "disrespectful and impertinent references to the trial judge").

In Theriault I, our dismissal was without prejudice to the filing of a proper notice of appeal

within ten days. 574 F.2d at 197. We decline to extend this option to Amanda and Richard Florance for two reasons: (1) on its merits, the mandamus petition would be denied; and (2) Richard Florance has already been sanctioned by this court.

Writs of mandamus or prohibition are rarely granted, and only when the right to relief is clear and indisputable. In re Estelle, 516 F.2d 480, 483 (5th Cir. 1975). The writ is not available when a petitioner has other adequate means to obtain the requested relief. In re Montes, 677 F.2d 415, 416 (5th Cir. 1982).

The petitioners first request that we cancel a hearing in Judge Schell's court. That hearing, scheduled for two days after the mandamus petition was filed in this court, has been held. Any relief we might have granted relative to that hearing is moot.

The petitioners seek the disqualification of Judge Schell under 28 U.S.C. § 455(a). Such an argument may be raised on appeal from final judgment. Tramonte v. Chrysler Corp., 136 F.3d 1025, 1027-28 (5th Cir. 1998) (district court's remand orders may not be appealable if they concern procedural or jurisdictional defects, but challenge to district court's authority to issue [⊥ 4] remand order, based on asserted disqualification under 28 U.S.C. § 455, is appealable). Thus, the Florances have an available remedy.

The petitioners also challenge "L.R. CV-11(g)" and its invocation by the district court. We have found no such local rule, but from their pleadings we infer that they mean the Eastern District's Appendix B, Local Rules of Court for the Assignment of Duties to

United States Magistrate Judges, Rule 1(G). [1] Contrary to the Florances' assertions, this local rule does not compel non-prisoner pro se litigants to consent to proceed before a magistrate judge; it sets out a procedure for nonconsensual referral under 28 U.S.C. § 636(b)(1)(A) and (B). Nor does the local rule single out non-prisoner pro se litigants for special treatment; other subsections of Appendix B, Rule 1, establish similar procedures for habeas corpus cases, prisoner civil cases, and some agency cases. The petitioners have shown no clear and indisputable right to relief on this ground. Further, any challenge to the magistrate judge's authority could also be raised on appeal. See Tramonte, 136 F.3d at 1028.

Because of the intemperate language that permeates the Florances' mandamus petition, we strike that pleading and dismiss [⊥ 5] with prejudice the request for mandamus relief. We warn both Amanda and Richard Florance that any future pleadings they may file that contain inappropriate comments concerning judicial personnel or other parties will result in similar treatment. We have already sanctioned Richard Florance in another context. In Florance v. CIR, 174 F. App'x 200 (5th Cir. 2006), we declined to add monetary penalties to the $10,000 penalty already assessed by the United States Tax Court, but we ordered the clerk of our court "to refuse to accept for filing any further pleadings or other instruments received from Florance or on his behalf without first obtaining the

[1] "Non-Prisoner Pro Se Cases. All non-prisoner pro se cases are automatically referred to a magistrate judge for preliminary proceedings.

The parties may consent to trial by the magistrate judge pursuant to 28 U.S.C. Section 636(c)."

authorization of a judge of this court." Florance, 174 F. App'x at 201, aff'g Florance v. CIR, 2005 WL 704809 (U.S. Tax Ct. Mar. 29, 2005). We clarify that that ban applies to all "pleadings or other instruments" from Richard Florance, not merely those connected with his Tax Court appeal.

PETITION STRICKEN; PETITION FOR WRIT OF MANDAMUS OR PROHIBITION DISMISSED WITH PREJUDICE; SANCTION WARNING ISSUED TO BOTH PETITIONERS; SANCTION AGAINST RICHARD JOHN FLORANCE, JR. IN FLORANCE V. CIR, 174 F. APP'X 200, 201 (5TH CIR. 2006), EXPANDED.

No. 05-60552 (original 90-day letter case)

2006 Mar 29—"Order" aff'g "tax court" and denying access

United States Court of Appeals
Fifth Circuit
F I L E D
March 29, 2006
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60552
Summary Calendar

RICHARD JOHN FLORANCE, JR.,
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,
Defendant - Appellee

Appeal from United States Tax Court
(11782-03 and 18209-03)

Before KING, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM: *

Proceeding pro se, Petitioner-Appellant, Richard John Florance, Jr. appeals adverse rulings of the United States Tax Court. We note that, in addition to rulings against Florance on all substantive issues, the Tax Court imposed sanctions grounded primarily in the frivolousness of his cases and the actions he took in prosecuting them. Now, in addition to seeking our affirmance of the Tax Court in all respects, Defendant-Appellee Commissioner of Internal Revenue asks us to impose sanctions [⊥ 2] against Florance for bringing a frivolous appeal.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Based on our review of the record on appeal, including the rulings and reasoning of the Tax Court and its imposition of sanctions, the operative facts, and the appellate briefs of the parties, we too conclude that the Tax Court correctly ruled in favor of the Commissioner on all substantive matters as well as sanctions, and that Florance's contentions there as here are wholly without merit.

Turning to sanctions for a frivolous appeal, the Commissioner has clearly made a case for their imposition, and Florance has filed to file a response or opposition thereto. Noting the sanctions already imposed by the Tax Court, and further noting that Florance is before us pro se, we decline to assess further monetary penalties. We do, however, order the Clerk of this Court to refuse to accept for filing any further pleadings or other instruments received from Florance or on his behalf without first obtaining the authorization of a judge of this court.

AFFIRMED; ORDER ISSUED PROHIBITING FURTHER FILINGS.

Trial court

2010 Jul 8—Final "Judgment"

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL - 8 2010
CLERK, U.S. DISTRICT COURT
By: /s/ ??
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,
Plaintiff,
vs.

DON BUSH, et al.,
Defendants.

No. 3:09-CV-1470-B-BH

FINAL JUDGMENT

This Judgment is issued pursuant to Federal Rule of Civil Procedure 58(a).

It is **ORDERED, ADJUDGED and DECREED** that *Collin County Defendants' Motion for Sanctions*, ("Mot.") filed March 15, 2010, (doc. 85), is **GRANTED in part**. As part of the imposed sanctions, this action is **SUMMARILY DISMISSED** with prejudice in its entirety because Plaintiff violated Fed. R. Civ. P. 11, filed the action in bad faith, and willfully abused the judicial process. Other than costs and expenses already imposed on Plaintiff, each party shall bear its own costs and expenses, including attorney's fees.

It is further **ORDERED** that the Clerk shall transmit to the parties a true copy of this Judgment, together with a true copy of the Order Accepting the Findings, Conclusions and Recom-mendation of the United States Magistrate Judge.

SIGNED this 8th day of *July*, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Jul 8—*Gonzalez*-defying "Order" compelling consent under § 636(b)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§
	§
Plaintiff,	§
	§
v.	§
	§
DON BUSH, et al.,	§
	§
Defendants.	§
	§
	§
	§
	§
	§
CIVIL ACTION NO. 3: 09-CV-1470-B	§
	§
	§
	§
	§

ORDER

Before the Court are Plaintiff Richard Florance's Motion to Strike Magistrate's Order of 25 May 2010 (doc. 93) and Motion to Strike Magistrate's Findings of 24 June 2010 (doc. 96) (collectively, "Motions"). Having considered the Motions, the Court finds that they should be and hereby are **DENIED**.

Through the Motions, Plaintiff moves to strike the Findings, Conclusions, and Recommendations entered by United States Magistrate Judge Ramirez on May 25, 2010 (doc. 92) and June 24, 2010 (doc. 95) (collectively, "Findings"). Specifically, Plaintiff contends that he did not consent to "magistrate participation" and that such consent is required under 28 U.S.C. § 636(b).

Pursuant to 28 U.S.C. § 636(b)(1)(B), a judge may designate a magistrate judge to submit proposed findings of fact and recommendations for the disposition of pretrial matters pending before the Court. The Court may then accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. *See* 28 U.S.C. § 636(b). Consent is not required [⊥ 2] to submit a matter to a magistrate judge for recommendation pursuant to § 636(b)(1)(B). *See, e.g.*, *Newsome v. E.E.O.C.*, 301 F.3d 227, 230 (5th Cir. 2002) (noting that the consent of the parties is not required under § 636(b)(1)(B)). Accordingly, the Court finds Plaintiffs objections to the Findings contain no merit and the Motions to Strike (doc. 93) (doc. 96) are hereby **DENIED.**

SO ORDERED.

SIGNED July 8, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Jul 8—"Order" accepting unconsented-to magistrate's findings and recommendation

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL - 8 2010
CLERK, U.S. DISTRICT COURT
By: /s/ ??
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,
Plaintiff,
vs.

DON BUSH, et al.,
Defendants.

No. 3:09-CV-1470-B-BH

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing all relevant matters of record in this case, including the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and any objections thereto, in accordance with 28 U.S.C. § 636(b)(1), the undersigned District Judge is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court. Accordingly, *Collin County Defendants' Motion for Sanctions*, ("Mot.") filed March 15, 2010, (doc. 85) is **GRANTED in part and DENIED in part** and Plaintiff is **SANCTIONED** as set out herein pursuant to Fed. R. Civ. P. 11 (c)(3) and the inherent powers of the Court.

Plaintiff shall pay monetary sanctions in the amount of $5,300.00 to the Clerk of the Court for the United States District Court for the Northern District of Texas. Until he has paid this monetary sanction in full, Plaintiff is **PROHIBITED** from filing any action in this Court. Even after Plaintiff pays the monetary sanction, he is **PROHIBITED** from filing any action arising from the facts which led to this litigation. In addition to any prior sanctions imposed against him, Plaintiff is also **PROHIBITED** from filing any action in this Court unless he has obtained leave of court through a proper motion for leave.

For purposes of this order, "filing" includes actions received by this Court via transfer or [⊥ 2] removal. Plaintiff, furthermore, may not obtain leave of Court without providing proof that he has paid the monetary sanctions imposed in this order. Leave will be summarily denied if any aspect of the proposed pleading seeks to pursue claims that have been or

could have been raised in this action. If the Court receives a transferred or removed action involving Plaintiff, he shall seek the requisite leave of court within fourteen days of the date of the order of transfer or removal or the Court will summarily dismiss the action without further notice. If the Court receives a pleading directly from Plaintiff without the requisite motion for leave or receives a motion for leave that is unaccompanied by the requisite proof of payment, the Court hereby directs the Clerk of the Court to docket the filing for administrative purposes only and immediately close the case after placing a copy of this order in the case file. The Court will not otherwise address or acknowledge submissions that are unaccompanied by a motion for leave or that do not show proof that the monetary sanctions have been paid.

For the reasons stated in the recommendation of the Magistrate Judge, this action will be **SUMMARILY DISMISSED** with prejudice in its entirety as a sanction for violating Fed. R. Civ. P. 11, filing the action in bad faith, and willfully abusing the judicial process. By separate judgment, the Court formally dismisses this action.

SIGNED this *8th* **day of** *July* **, 2010.**

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2009 Oct 30—Hard copy mailed to RJF of ECF receipt of Order granting extension for Service

District Version 3.2.3 - Display Receipt
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U.S. District Court

Northern District of Texas

Notice of Electronic Filing

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Case Name: Florance v. Bush et al

Case Number: 3:09-cv-1470

Filer:

Document Number: 3(No document attached)

Docket Text:
ELECTRONIC ORDER granting [2] Motion to Extend Time. (Ordered by Judge Jane J Boyle on 10/30/09) (Judge Jane J Boyle)

3:09-cv-1470 Notice has been electronically mailed to:

If you have not consented to receive electronic notice, or if you are no longer an active participant in this case and you want electronic noticing to be turned off so that you will stop receiving filing notices, click here, then click on "Ask a Question."

3:09-cv-1470 Notice will not be electronically mailed to:

Richard John Florance, Jr
1908 Vassar Drive
Richardson, TX 75081

1 of 1 11/2/2009 7:38 AM

2009 Dec 21—"Order" contorting Service date into proof of Service date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§
Plaintiff,	§
v.	§
DON BUSH, et al.,	§
Defendants.	§
	§ **CIVIL ACTION NO. 3: 09-CV-1470-B**

ORDER

Plaintiff filed the above-referenced case on July 16, 2009. On October 30, 2009, the Court extended the time for service on Defendants to December 14, 2009. The time for service has passed and Plaintiff

has not filed a valid return of service as to any of the Defendants in this action. Pursuant to FED. R. CIV. P. 4(m), all Defendants are subject to dismissal without further notice. The Court hereby puts Plaintiff on notice that all claims against all Defendants may be dismissed for failure to file a valid return of service.

Accordingly, by **December 28, 2009**, Plaintiff must file a valid return of service as to Defendants showing service within the December 14, 2009 deadline, or Defendants may be dismissed without further notice for failure to prosecute.

SO ORDERED.

SIGNED December 21, 2009

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Jan 29—Sua Sponte "Order" rewarding SOLOMON's avoidance of the process server via dismissal, with Order denying extension

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
DON BUSH, et al.,	§	
	§	
Defendants.	§	
	§	
	§	
	§	
	§	
	§	
	§	**CIVIL ACTION NO. 3: 09-CV-1470-B**
	§	
	§	
	§	
	§	

ORDER

Before the Court is Plaintiff's Second Request for Extension of Time (doc. 52), filed January 12, 2010. Through the Motion, Plaintiff requests an additional

60 days to serve Defendant Amanda Solomon. The Court previously extended the time for service on all defendants on October 30, 2009. Having considered the Motion and the filings in this action to date, the Court finds that the Motion should be and hereby is **DENIED**. Furthermore, pursuant to FED. R. CIV. P. 4(m) and the Show Cause Order (doc. 7) entered on December 21, 2009, all claims against Amanda Solomon are **DISMISSED**.

SO ORDERED.

SIGNED January 29, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Feb 4—Sua Sponte "Order" rewarding BARRY's, ROACH's, WESTERFELD's, RICHARDSON's, FREDERICKS', and RUSCH's avoidance of the process server via dismissal, with Order denying extension

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§
	§
Plaintiff,	§
	§
v.	§
	§
DON BUSH, et al.,	§
	§
Defendants.	§
	§
	§
	§
	§
	§
	§
CIVIL ACTION NO. 3: 09-CV-1470-B	§
	§
	§
	§
	§

ORDER

Before the Court are Plaintiff's Second Motions

for Extensions of Time (doc. 57)(doc. 58)(doc. 59)(doc. 60)(doc. 61)(doc. 62) (collectively, "Motions"), filed February 2, 2010. Through the Motions, Plaintiff requests an additional 60 days to serve Defendants John Barry, John Roach, Andrea Westerfield [sic], Jonathan Richardson, Christopher Fredericks, and Mark Rusch. The Court previously extended the time to accomplish service of process by 30 days on October 30, 2009. Having considered the Motions and the filings in this action to date, the Court finds that the Motions should be and hereby are **DENIED**. Furthermore, pursuant to FED. R. CIV. P. 4(m) and the Show Cause Order (doc. 7) entered on December 21, 2009, all claims against Defendants John Barry, John Roach, Andrea Westerfield [sic], Jonathan Richardson, Christopher Fredericks, and Mark Rusch are **DISMISSED**.

SO ORDERED.

SIGNED February 4, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Feb 4—Sua Sponte "Order" rewarding COLLIN COUNTY's (SELF's) avoidance of the process server via dismissal, with Order denying extension

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§
	§
Plaintiff,	§
	§
v.	§
	§
DON BUSH, et al.,	§
	§
Defendants.	§
	§
	§
	§
	§
	§
CIVIL ACTION NO. 3: 09-CV-1470-B	§
	§
	§
	§
	§

ORDER

Before the Court is Plaintiff's Second Motion for Extensions of Time to Serve Self (Collin County) (doc.

63) (the "Motion"), filed February 2, 2010. Through the Motion, Plaintiff requests an additional 60 days to serve Defendant County of Collin. The Court previously extended the time to accomplish service of process on Defendant County of Collin by 30 days on October 30, 2009. Accordingly, having considered the Motion and the filings in this action to date, the Court finds that the Motion should be and hereby is **DENIED**. Furthermore, pursuant to FED. R. CIV. P. 4(m) and the Show Cause Order (doc. 7) entered on December 21, 2009, all claims against Defendant County of Collin are **DISMISSED**.

SO ORDERED.

SIGNED February 4, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 Apr 19—*Gonzalez*-defying referral "Order"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,	§
Plaintiff,	§
v.	§
DON BUSH, et al.,	§
Defendants.	§
CIVIL ACTION NO. 3: 09-CV-1470-B	§

STANDING ORDER REFERRING PRETRIAL MATTERS

Pursuant to 28 U.S.C. § 636(b), this case is hereby referred to **U.S. Magistrate Judge Irma C. Ramirez** for pretrial management. All non-dispositive motions are prospectively referred to the

magistrate judge for determination. All case dispositive motions are prospectively referred to the magistrate judge for recommendation. All other pretrial matters, including scheduling and alternative dispute resolution, are referred to the magistrate judge for appropriate action consistent with applicable law.

SO ORDERED.

DATED April 19, 2010.

/s/ Jane J. Boyle
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

2010 May 25—Unconsented-to magistrate's findings, conclusions, and recommendation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,
Plaintiff,
vs.

DON BUSH, et al.,
Defendants.

No. 3:09-CV-1470-B-BH

Pretrial Management

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Pursuant to Special Order No. 3-251, this case has been referred for pretrial management, including the determination of non-dispositive motions and issuance of findings of fact and recom-mendations on dispositive issues. Before the Court are the following motions:

(1) *United States' Motion to Dismiss, or alternatively, For a More Definite State-ment,* ("U.S. Mot."), filed January 20, 2010, (doc. 53);

(2) *Putative Defendant J.P. Court Precinct 3, Place 1 of Dallas County, Texas' Motion to Dismiss,*

("J.P. Ct. Mot."), filed January 20, 2010, (doc. 54);

(3) *Defendants', The State of Texas and the Fifth Court of Appeals, Motion to Dismiss Pursuant to Rule 12*, ("State Mot."), filed January 28, 2010, (doc. 55);

(4) *Defendant City of Dallas's Motion to Dismiss*, ("Dallas Mot."), filed February 4, 2010, (doc. 64);

(5) *Defendants Anthony G. Brocato, Jr. and State of Texas' Motion to Dismiss for Insufficient Service of Process and Failure to State a Claim*, ("Brocato Mot."), filed February 12, 2010, (doc. 70);

(6) *Defendants Taylor, Miller, Kim, and Smith's Consolidated Rule 12 Motion to Dismiss*, ("Collin County Mot."), filed February 17, 2010, (doc. 71);

(7) *Defendants Davis and Mathews, Stein, Shiels, Pearce, Knott, Eden & Davis' Consolidated Rule 12 Motion to Dismiss*, ("Davis Mot."), filed February 18, 2010, (doc. 72);

(8) *Defendants City of Plano, Plano Municipal Court, Judge Don Stevenson, Rodney D. Patten and Paige Mims' Consolidated Rule 12 Motion to Dismiss*, ("Plano Mot."), filed February 19, 2010, (doc. 73); [⊥ 2]

(9) *RJF's First and Standing Motion to Strike per FRCP 11(a) – DOJ and the Individual Defendants*, filed February 24, 2010, (doc. 76);

(10) *RJF's First and Standing Motion to Strike per FRCP 11(a) – DOJ*, filed February 24, 2010, (doc. 77);

(11) *RJF's Second and Standing Motion to Strike per FRCP 11(a) – State AG's Office and the*

"Individual" Defendants, filed March 12, 2010, (doc. 84); and

(12) *RJF's Second and Standing Motion to Strike per FRCP 11(a) – State AG's Office*, filed March 19, 2010, (doc. 91).

Based on the relevant filings and applicable law, Plaintiff's motions to strike should be **DENIED**, and the motions to dismiss should be **GRANTED**.

I. BACKGROUND

On July 16, 2009, Plaintiff filed this civil action against fifty-two defendants, including several defendants that he sued in a prior action.[1] (*See* Compl., doc. 1, at 1-5 (listing defendants in caption).) On December 7, 2009, he filed a 321-paragraph, 92-page amended complaint that lists fifty-three defendants[2] (adding two defendants and omitting

[1] Plaintiff sued fifteen defendants under state and federal law for their alleged roles in or leading to earlier litigation in *Florance v. Buchmeyer* (*Florance I*), 500 F. Supp. 2d 618, 628-31 (N.D. Tex. 2007) (accepting and supplementing recommendation of Mag. J. which sets out relevant litigation history). The Court dismissed all claims with prejudice, except for the claims against unknown clerks that were dismissed without prejudice for lack of personal jurisdiction. *See Florance v. Buchmeyer*, No. 3:07-CV- 125-M (N,D. Tex. July 31, 2007) (Judgment, doc. 62).

[2] Plaintiff names the United States and the United Stales of America as separate defendants, and he distinguishes between the "Proper" and "Federal" capacities for various defendants by using all capital letters for the "Federal Capacity". (*See* Am. Compl. at 1-5, 15.) He contends "the legal person under the Law of the Land animates the Proper Capacity" whereas the legal person in the current "funny money" system animates the Federal Capacity. (*See id.* at 15.)

Jerry Buchmeyer).[3] (*See* Am. Compl., doc. 5, at 1-5, 20.) The amended complaint does not assert specific claims against particular defendants. Instead, it generally alleges "[o}ne of the Largest Conspiracies of its kind in the nation's history", treason for targeting him for abuse based upon events related to his prior litigation, a [⊥ 3] "funny money" scam that differentiates between "Law of the Land" and "Law of the Sea" depending on whether there is gold and silver coin in general circulation, a "federal income tax scam", a "bogus 'underage consumption' case" against his daughter, a lien that Plaintiff filed against Defendant Taylor which led to his criminal conviction; various incidents in cases removed from state court, and alleged libel and slander by Defendant Davis. (*See id.* at 14-21 (the "overview" of the conspiracy), 24-25 (identifying libelous and slanderous acts), 26-80 (providing additional detail about the treason and tyranny), 81-83 (summarizing Plaintiff's positions).) Plaintiff seeks damages from the state and federal officers, agents, and employees under 42 U.S.C. § 1983 (state actors) or Bivens[4] (federal actors), and contends that they are liable for tort claims that accompany violations of criminal law. (*See id.* at 84.) He also seeks actual, nominal, and punitive damages against the state and federal actors and the State of Texas, the City of Plano ("Plano"), the City of Dallas ("Dallas"), and the United States, as well as declaratory, injunctive, and "unique" relief. (*See id.* at 84-92.)

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[3] Because Defendant Buchmeyer has been omitted from the amended complaint, the Clerk of the Court is directed to note on the docket that he is no longer a party to this action. [⊥ 3]

[4] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

On December 21, 2009, the Court ordered Plaintiff to file a valid return of service for each defendant that shows service on or before the deadline for service, December 14, 2009. (*See* Order, doc. 7.) He was put on notice that a failure to show proper service by December 28, 2009, could result in dismissal of defendants "without further notice for failure to prosecute." (*See id.*) On December 28, 2009, Plaintiff filed certified mail receipts, copies of summons, and unsigned and incomplete returns of service for numerous defendants. (See Docs. 10-51.) [5]Numerous motions to dismiss ensued, and the issues are ripe. [⊥ 4]

II. PLAINTIFF'S MOTIONS TO STRIKE

Pursuant to Fed. R. Civ. P. 11(a), Plaintiff moves to strike all documents, including the motion to dismiss by the United States (doc. 53), signed by any person from the Department of Justice ("DOJ"). (*See* Doc. 76 at 2; Doc. 77 at 2.) He also moves to strike all documents, including documents 55 and 70, signed by anyone with the Texas Attorney General's Office who purports to speak on behalf of any individual defendant. (*See* Doc. 84 at 2, Doc. 91 at 2.) He essentially contends that there is a lack of authority for the signatures. (*See generally* Docs. 76-77, 84, 91.)

Rule 11(a) requires that every filed document be signed by the attorney of record or by the party

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[5] The Court subsequently denied Plaintiff's motions for extensions of time to serve defendants Amanda Soloman [sic], John Barry, John Roach, Andrea Westerfield [sic], Jonathan Richardson, Christopher Fredericks, and Mark Rusch, and dismissed all claims asserted against them. (*See* Orders, docs. 56 and 66.) [⊥ 4]

personally, if unrepresented. Unsigned papers must be struck "unless the omission is promptly corrected after being called to the attorney's or party's attention." Fed. R. Civ. P. 11(a). Although Plaintiff contends that three motions (docs. 53, 55, and 70) are unsigned due to a perceived lack of signatory authority, Rule 11 provides no basis to challenge the authority a chosen representative has to sign documents filed with the Court. Moreover, the DOJ is statutorily authorized to represent the United States and its agencies and officers, *see* 28 U.S.C. §§ 516 and 517, and the Texas Attorney General's Office is authorized to represent state defendants, *see* Tex. Civ. Prac. & Rem. Code Ann. §§ 104.001, 1004.002 [sic], 104.004, and 108.002. Plaintiff's motions to strike have no merit and should be **DENIED**.

III. INVALID RETURN OF SERVICE

The United States moves to dismiss this action because Plaintiff has failed to comply with the December 21, 2009 order that he file a valid return of service for each served defendant. (U.S. Mot. at 1-2.)

A valid return complies with Fed. R. Civ. P. 4(l), which requires a "server's affidavit" except [⊥ 5] when service was effected by a United States marshal or deputy marshal. That exception does not apply in this case, and no filed return of service has been completed or signed. Without a proper affidavit from the server, the filed returns of service are invalid, and all defendants are subject to dismissal without notice based upon the Court's December 21, 2009 order. (*See* Doc. 7.) In addition, Fed. R. Civ. P. 41(b) grants authority to involuntarily dismiss an

action for failure to comply with a court order. The United States' motion should be granted on this basis. However, because the United States also presents grounds for dismissal of the claims against it with prejudice, the Court also considers those issues.

IV. RULE 12(b)(2) and 12(b)(5) MOTIONS

Several defendants have moved to dismiss this action due to insufficient service of process. (*See* U.S. Mot. at 2-4; J.P. Ct. Mot. at 4-5; Brocato Mot. at 2-4; Collin County Mot. at 4-5; Davis Mot. at 2-4; Plano Mot. at 3-5.)[6] Rules 12(b)(2) and (5) of the Federal Rules of Civil Procedure respectively authorize dismissal for lack of personal jurisdiction and when a party has not been properly served.[7]

Plaintiffs must properly serve defendants with summons and a copy of the complaint. *See* Fed. R. Civ. P. 4(c)(1). The courts insist on strict compliance with the rules for service of process. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 940 (5th Cir. 1999). Substantial compliance is insufficient. *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 300-03 (7th Cir. 1991). All parties, even those proceeding pro se, must comply with the "relevant rules of [⊥ 6] procedure." *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981). "When

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[6] For filings that do not include their own page numbers, the Court uses the page number shown on the scanned version of the document.

[7] "In the absence of service of process (or waiver of service by the defendant)," courts ordinarily may not exercise per-sonal jurisdiction over defendants. *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). [⊥ 6]

service of process is challenged, the serving party bears the burden of proving its validity or good cause for failure to effect timely service." *Sys. Signs Supplies v. U.S. Dep't of Justice*, 903 F.2d 1011, 1013 (5th Cir. 1990).

Under the federal rules, service may be effected by any person *who is not a party* and who is at least eighteen years of age. Fed. R. Civ. P. 4(c)(2). Rule 4 describes various methods of service for particular defendants, some of which allow service in accordance with state law. *See, e.g.*, Fed. R. Civ. P. 4(e) (serving an individual within the United States); (j)(2) (serving state or local government). The Texas rules of civil procedure also preclude any "person who is a party to or interested in the outcome of a suit" from serving process in that suit. Tex. R. Civ. P. 103 (emphasis added). Because neither Texas nor the federal rules "permit a *party* to serve a summons or process", a party fails to comply with the procedural requirements for adequate service of process when he personally mails the summons to defendants through certified mail. *Hill v. N. Tex. State Hosp.*, No. 7:09-CV-158-O, 2010 WL 342227, at *1 (N.D. Tex. Jan. 26, 2010) (adopting recommendation of Mag. J.). In those circumstances, the attempted service is ineffective. *See Jackson v. Atrium Cos., Inc.*, No. 3:04-CV-0679-G, 2004 WL 1773699, at *2 (N.D. Tex. 2004).

Here, Plaintiff states that he "has caused each defendant to be served by Restricted Delivery mail services provided by USPS [(United States Postal Service)]." (*See* Resp. to Brocato Mot. at 3.) He contends that the USPS is neither a party to this litigation nor an interested person. (*Id.* at 4.) This position is contrary to established law. *See Hassell v.*

United States, 203 F.R.D. 241, 246 (N.D. Tex. 1999) (finding service defective when a party mails documents to the defendant).

Because Plaintiff has not complied with the rules governing service, his attempted service of process is insufficient. In general, Rule 4(m) requires dismissal without prejudice when service [⊥ 7] has not been effected within 120 days of filing the complaint unless the Plaintiff shows good cause to extend the time for service. The 120-day period has long elapsed, and Plaintiff has not shown good cause for an additional extension of time. Consequently, the motions to dismiss for insufficient service of process should be granted. Because defendants also present grounds for dismissal of this action with prejudice, the Court also considers those grounds.

V. RULE 12(b)(1) MOTIONS

Some defendants seek dismissal under Rule 12(b)(1) for lack of subject mailer jurisdiction. Federal courts are courts of limited jurisdiction; without jurisdiction conferred by the Constitution and statute, they lack the power to adjudicate claims. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

"When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."

Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). Considering Rule 12(b)(1) motions first "prevents a court without jurisdiction from prematurely dismissing a case with prejudice." *Id.* When the court dismisses for lack of subject matter jurisdiction, that dismissal "is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id.*

The district court may dismiss for lack of subject matter jurisdiction based on (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v.* [⊥ 8] *Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). A motion to dismiss based on the complaint alone presents a "facial attack" that requires the court to merely decide whether the allegations in the complaint, which are presumed to be true, sufficiently state a basis for subject matter jurisdiction. *See Paterson v. Weinberger*, 644 F. 2d 521, 523 (5th Cir. 1998). "If sufficient, those allegations alone provide jurisdiction." *Id.* Facial attacks are usually made early in the proceedings. *Id.* When the defendant supports the motion with evidence, then the attack is "factual" and "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Williamson*, 645 F.2d at 413. A factual attack may occur at any stage of the proceedings. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). Regardless of the nature of attack, the party

asserting jurisdiction constantly carries the burden of proof to establish that jurisdiction does exist. *Ramming*, 281 F.3d at 161.

In this case, defendants present a facial attack that does not require the Court to resolve matters outside the pleadings. *See Ramming*, 281 F.3d at 161; *Williamson*, 645 F.2d at 412-13.

A. Federal Sovereign Immunity

The United States, on behalf of itself and officers sued in their official capacities, argues that the Court lacks jurisdiction due to sovereign immunity and Plaintiff's failure to timely file an administrative claim under the Federal Torts Claim Act ("FTCA"). (U.S. Mot. at 4-5, 7-9.)

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The immunity also shields federal officers [⊥ 9] from official capacity suits because such suits are actually against the government. *See Smart v. Holder*, No. 09-50796, 2010 WL 759164, at *2 (5th Cir. Mar. 5, 2010) (citing *Boehms v. Crowell*, 139 F.3d 452, 462-63 (5th Cir. 1998); *S. Sog, Inc. v. Roland*, 644 F.2d 376, 380 (5th Cir. Unit A May 1981)).

Because federal sovereign immunity is jurisdictional in nature, the consent or waiver must be unequivocally expressed. *Freeman v. United States*, 556 F.3d 326, 335 (5th Cir. 2009). The terms

of the consent/waiver define the jurisdictional boundaries to entertain the suit. *Meyer*, 510 U.S. at 475. In general, the scope of a waiver of sovereign immunity is strictly construed "in favor of the sovereign." *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1942 (2008). This general rule, however, "is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating' the central purpose of the statute, which 'waives the Government's immunity from suit in sweeping language." *Dolan v. US. Postal Serv.*, 546 U.S. 481, 482 (2006) (citations omitted).

Here, Plaintiff asserts that the named federal actors are liable under *Bivens* and tort law. (Am. Compl. at 84.) He contends that the United States is liable because it has encouraged and allowed use of its name as part of the conspiracy against him, and because it failed to stop the conspiracy.[8] (Id. at 86-87.)

1. *Bivens*

Sovereign immunity protects the United States and the federal employees sued in their official capacities from constitutional claims asserted under *Bivens*. *See Affiliated Prof'l Home* [⊥ 10] *Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999); *Williamson v. U.S. Dep't of Agric.*, 815 F.2d

[8] As in his prior federal action, Plaintiff also contends that "[t]here is no immunity for criminal conduct." (*See* Doc. 68 at 4; Doc. 78 at 5-6; Doc. 79 at 4-7.) Private citizens "cannot initiate a federal criminal prosecution because that power is vested exclusively in the executive branch," however. *Florance I*, 500 F. Supp. 2d at 635. Plaintiff has no constitutional right to have anyone criminally prosecuted. *Id.* [⊥ 10]

368, 380-81 (5th Cir. 1987). Even if Plaintiff seeks to impose liability on a theory of respondeat superior, *Bivens* provides no basis to hold the United States liable. *See Cronn v. Buffington*, 150 F.3d 538, 544-45 (5th Cir. 1998). Plaintiff's *Bivens* claims against the United States and its employees sued in their official capacities should be dismissed for lack of jurisdiction.

2. *FTCA*

Tort claims against the United States and federal actors arise under the FTCA. See 28 U.S.C. §§ 1346(b)(1), 2671-2680. "In the FTCA, Congress waived the United States' sovereign immunity for claims arising out of torts committed by federal employees." *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 835 (2008). To successfully sue under the FTCA, "a plaintiff must name the United States as the sole defendant." *McGuire v. Turnbo*, 137 F.3d 321, 324 (5th Cir. 1998). For jurisdictional purposes, Plaintiff must exhaust his administrative remedies under the FTCA before filing suit. *See McNeil v. Unites States*, 508 U.S. 106, 112-13 (1993); *Price v. United States*, 69 F.3d 46, 54 (5th Cir. 1995).

"Exhaustion of administrative remedies is a jurisdictional prerequisite to suit under the Tort Claims Act, and absent compliance with the statute's requirement [a] district court [is] without jurisdiction." *McAfee v. 5th Circuit Judges*, 884 F.2d 221, 222-23 (5th Cir. 1989). Section 2675(a) of Title 28 of the United States Code provides, in pertinent part:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or

> death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final [⊥ 11] denial of the claim for purposes of this section.

Plaintiff has not alleged that he has exhausted administrative remedies in compliance with § 2675(a). Consequently, the Court does not have jurisdiction over Plaintiff's tort claims against the United States or any federal actor sued in their official capacities.

The Court should grant the United States's motion to the extent it seeks to dismiss the *Bivens* and FTCA claims for lack of jurisdiction.

B. <u>Declaratory and Injunctive Relief</u>

The United States construes Plaintiff's amended complaint as seeking a declaration regarding his status as a taxpayer and liability for taxes and an injunction to preclude it from making future tax claims against him. (U.S. Mot. at 4, 10-11.) Although Plaintiff adamantly contends that this is a suit for damages which has "nothing to do with 'taxes" (see Doc. 68 at 8), his amended complaint seeks numerous declarations regarding tax matters (*see*

Am. Compl. at 89-90).

Section 1346(a)(1) of Title 28 of the United States Code provides federal jurisdiction over certain federal tax matters.[9] That statute provides consent by the United States "to be sued for taxes improperly assessed or collected, but only if the plaintiff complies with the jurisdictional requirements set forth in 26 U.S.C. § 7422." *Brashear v. United States*, 138 F. Supp. 2d 786, 789 (N.D. Tex. 2001) (citation omitted). The United States argues that the Court lacks jurisdiction to make declarations regarding any tax matters at issue in this case or to grant an injunction to preclude it [⊥ 12] from making future tax claims against Plaintiff. (*See* U.S. Mot. at 4, 10-11.)

With limited exceptions not pertinent here, Congress has excluded federal tax mailers from the scope of the Declaratory Judgment Act, 28 U.S.C. § 2201. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). Due to that exclusion, the Court is without jurisdiction to issue a declaration that Plaintiff is not a taxpayer and is not liable for taxes. *See Walters v. United States*, 287 F. App'x 392, 395 (5th Cir. 2008). To the extent Plaintiff seeks a

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[9] Section 1346(a) provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal claims [sic], of:
>
> > (1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws[.][⊥ 12]

declaration related to federal tax mailers, he has no recourse under § 2201.

Similarly, the Anti-Injunction Act (codified at 26 U.S.C. § 7421(a)) provides that with exceptions not relevant here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Section 7421 (a) "withdraw[s] jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Enochs v. Williams Packing & Nay. Co.*, 370 U.S. 1, 5 (1962); *accord Bob Jones Univ.*, 416 U.S. at 749. However, *Enochs* recognized "that a pre-enforcement injunction against the assessment or collection of taxes may be granted" when two criteria are met: (1) "if it is clear that under no circumstances could the Government ultimately prevail" and (2) "if equity jurisdiction otherwise exists". *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 758 (1974) (quoting *Enochs*, 370 U.S. at 7). The second criteria is met when irreparable injury will result in the absence of an issued injunction. *Bob Jones Univ.*, 416 U.S. at 737. Plaintiff has alleged no irreparable injury and has made no argument which shows that the government will be unable to assess or collect taxes from him in the future. The Court lacks jurisdiction to grant an injunction to the extent Plaintiff seeks to preclude the United States from making future tax claims against him. [⊥ 13]

C. State Sovereign Immunity

The State of Texas and the Fifth Court of Appeals seek dismissal under Rule 12(b)(1) dismissal because they are immune from suit under the Eleventh

Amendment. (State Mot. at 4.) Defendant Brocato also seeks dismissal based on Eleventh Amendment immunity to the extent he is sued in his official capacity.[10] (*See* Brocato Mot. at 5.)

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[11] This Amendment exemplifies a fundamental rule that the federal courts are without authority to entertain private suits against an unconsenting State. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 9899(1984). The rule is a jurisdictional bar to suit. *See id.* at 99 n.8; *Severance v. Patterson*, 566 F.3d 490, 495 (5th Cir. 2009); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 465-66 (5th Cir. 1999). "This withdrawal of jurisdiction effectively confers an immunity from suit." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). "[A]n unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415

[10] Brocato and the State of Texas raise Eleventh Amendment immunity in the context of Fed. R. Civ. P. 12(b)(6). (*See* Brocato Mot. at 4-5.) However, because the immunity is a jurisdictional issue, it is properly addressed under Rule 12(b)(1). *See, e.g.*, *Severance v. Patterson*, 566 F.3d 490, 494-95 (5th Cir. 2009).

[11] Although courts and litigants often use "Eleventh Amendment immunity" as a "convenient shorthand", the phrase is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *N. Ins. Co. of N.Y. v. Chatham County. Ga.*, 547 U.S. 189, 193 (2006) (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)). [⊥ 14]

U.S. 651, 663 (1974). In addition, except for suits for prospective injunctive relief, official capacity suits against state officials are precluded by principles of sovereign immunity set out in the Eleventh Amendment. *Pennhurst*, 465 U.S. at 101-03; *McCarthy ex rel. Travis v.* [⊥ 14] *Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004). Although Congress has the power to abrogate that immunity through the Fourteenth Amendment, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72-76 (2000), and the State may waive its immunity by consenting to suit, *AT&T Communic'ns v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 643(5th Cir. 2001), the State has not waived its immunity by consenting to suit nor has Congress abrogated the immunity by enacting 42 U.S.C. § 1983, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Sovereign immunity also cloaks state courts with immunity from suit. *See Curry v. Ellis County, Tex.*, No. 3:08-CV- 1675-L, 2009 WL 2002915, at *3 (N.D. Tex. July 10, 2009).

Because the State of Texas and its courts are protected by sovereign immunity, this Court lacks jurisdiction over Plaintiff's claims against them. Because Plaintiff does not seek prospective injunctive relief against Brocato, Plaintiff is also jurisdictionally barred from pursuing an official capacity claim against him. The Court should grant the motions to dismiss to the extent they seek a jurisdictional dismissal on the basis of sovereign immunity.

VI. RULE 12(b)(6) MOTIONS

Several defendants move for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Motions to dismiss under

Rule 12(b)(6) are disfavored and rarely granted. *Sosa v. Coleman*, 646 F.2d 991, 993 (5th Cir. 1981). Under the 12(b)(6) standard, a court cannot look beyond the pleadings. *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). It is well-established that "*pro se* complaints are held to less stringent standards than formal pleadings drafted by lawyers." *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir. 1981). However, regardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, pleadings must show specific, well-pleaded facts, not mere conclusory allegations to avoid dismissal. *Guidry v.* [⊥ 15] *Bank of LaPlace*, 954 F.2d 278, 281(5th Cir. 1992). The court must accept those well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker*, 75 F.3d at 196. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable, and 'that a recovery is very remote and unlikely.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted).

Nevertheless, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555; *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasizing that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). The alleged facts must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In short, a complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its

face." *Id.* at 570.

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the miscon-duct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 129 S. Ct. at 1949 (citations omitted).

A. *Heck* Bar

The Plano and Collin County Defendants urge the Court to dismiss the action against them because Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). (Plano Mot. at 58; Collin County Mot. at 5-8.)

A claim that falls under the rule announced in Heck "is legally frivolous unless the [⊥ 16] conviction or sentence at issue has been reversed, expunged, invalidated, or otherwise called into question." *Hamilton v. Lyons*, 74 F.3d 99, 102 (5th Cir. 1996). To determine the applicability of Heck in a given case, the courts examine the nature of the plaintiff's conviction and the nature of the civil claims asserted. *Bush v. Strain*, 513 F.3d 492, 497 (5th Cir. 2008); *Ballard v. Burton*, 444 F.3d 391,401 (5th Cir. 2006). When "the factual basis for the conviction is temporally and conceptually distinct" from the asserted civil claims, Heck does not bar the claims.

Bush, 513 F.3d at 498.

Here, Plaintiff asserts a broad conspiracy claim which includes his conviction for filing a lien against Defendant Taylor. To the extent that *Heck* applies and bars claims raised in this action, such claims have no basis in law and would be subject to dismissal. Nevertheless, the case presents issues that are appropriate for early and final determination, and the Court proceeds to those issues. *See Patton v. Jefferson Corr. Ctr.*, 136 F.3d 458,462 n.6 (5th Cir. 1998) (when an action raises an issue of immunity, the court to the extent it is feasible to do so should determine that issue as early in the proceedings as possible); *Reed v. City of Dallas*, No. 3:05-CV-0004-G, 2006 WL 1876638, at *3.4 (N.D. Tex. June 29, 2006) (accepting recommendation that a lack of state action and a failure to allege any official policy or custom so as to impose municipal liability provides issues that are appropriate for early and final determination); *Smithback v. Cockrell*, No. 3:01-CV-1658-M, 2002 WL 1268031, at *2 (N.D. Tex. June 3, 2002) (accepting recommendation that "[w]hen a plaintiff seeks relief unavailable under 42 U.S.C. § 1983 or sues individuals or entities who are not proper parties under § 1983, it also seems appropriate to have an early determination of those issues").

B. **Jural Entity**

The J.P. Court argues that the action against it should be dismissed because it is a non-jural entity not subject to suit. (*See* J.P. Ct. Mot. at 2-3.) State courts are non-jural entities which cannot [⊥ 17] be sued. *See Smithback*, 2002 WL 1268031, at *2. Defendant J.P. Court is a state court presided over

by a justice of the peace, which has jurisdiction over certain criminal matters. See Tex. Code Crim. Proc. Ann. art. 4.11 (Vernon 2007). Accordingly, the J.P. Court's motion (doc. 54) should be granted, and the claims against that court should be dismissed with prejudice.

C. Municipal Liability

Dallas seeks dismissal because Plaintiff has not sued it under 42 U.S.C. § 1983 and has stated insufficient facts to support a claim for municipality liability. (Dallas Mot. at 2-8.) In response, Plaintiff requests that the motion be granted because a county rather than a city officer was involved. (See Doc. 74 at 2-3.) In light of Plaintiff's request, the Court should grant the motion. In addition, the motion succeeds on its merits.

Plaintiff seeks monetary damages against the state officers, agents, and employees under 42 U.S.C. § 1983. (Am. Compl. at 84, & 288.) Plaintiff alleges that the JP proceeding regarding a ticket he received for failure to update the window sticker for registering his vehicle shows that Dallas "want[ed] a piece of [him]". (*Id.* at 73, ¶¶ 259-61.) According to Plaintiff, the officer gave him the ticket even though he knew that Plaintiff had paid the fees at issue but had simply failed to change the window sticker. (*Id.* at 73, ¶ 259.) When Plaintiff appeared in JP Court to contest the citation, the court denied his motion to dismiss but later dismissed the case against him. (*Id.* at 73, ¶ 26061.) Plaintiff contends that Dallas is jointly and severally liable for all damages awarded against its police officers and judges because it failed to train them. (*Id.* at 89, ¶ 305.)

It is well-settled that one cannot prevail under 42 U.S.C. § 1983 on a theory of respondeat superior. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Whitt v. Stephens County*, 529 F.3d 278, 283 (5th Cir. 2008). Vicarious liability alone will not support a claim for relief under § [⊥ 18] 1983. *Whitt*, 529 F.3d at 283. A defendant cannot be held liable under such a theory simply because individuals in its employ performed acts that the plaintiff contends violated his constitutional rights. *Id.*; *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 200 (5th Cir. 1999). Instead, to hold a municipality liable under § 1983, plaintiffs must show an "underlying claim of a violation of rights", as well as, "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005). One incident does not show a policy or custom. *World Wide Street Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 753-54 (5th Cir. 2009); *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002). Moreover, in general, "single constitutional violations" are insufficient to infer a custom or policy. *Piotrowski v. City of Houston*, 237 F.3d 567, 581 (5th Cir. 2001). Additionally, to state a failure to train claim, the plaintiff must allege that "the failure to train amounted to 'deliberate indifference' to the rights of persons with whom [the employees] come into contact." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 123-24 (1992).

Plaintiff has not alleged any official policy or custom that violated his constitutional rights or deliberate indifference on the part of Dallas. He has failed to state a plausible claim against Dallas, and

his claims against it should be dismissed.

D. Qualified Immunity

Brocato requests that this action against him in his individual capacity be dismissed because Plaintiff has not overcome his qualified immunity defense. (Brocato Mot. at 5-6.)

A governmental employee who is sued under § 1983 may assert the affirmative defense of qualified immunity. *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). Qualified immunity protects government officials performing discretionary functions from suit and liability for civil dam- [⊥ 19] ages to the extent their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Because an official is entitled to immunity from suit, not merely from liability, immunity questions should be resolved at the earliest possible stage in the litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In deciding whether a defendant is entitled to qualified immunity, courts conduct a two-prong inquiry. The first prong entails consideration of whether the facts alleged, taken in the light most favorable to the plaintiff, show a violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200 (2001), *overruled in part by Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). Under the second prong, courts determine whether the violated constitutional

right was clearly established within the specific context of the case. *Id.* at 201. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. It is within the discretion of the court to decide which of the two prongs to address first in light of the circumstances particular to the case at hand. *Pearson*, 129 S. Ct. at 818; *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 409 (5th Cir. 2009) ("*Saucier's* rigid 'order of battle'. . . is now advisory."). If the court answers both the constitutional violation and clearly established questions in the affirmative, the officer is not entitled to qualified immunity. *Lytle*, 560 F.3d at 410.

The plaintiff has the burden to show the inapplicability of an asserted qualified immunity defense. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) (per curiam). To satisfy that burden on a [⊥ 20] motion to dismiss, the plaintiff must claim that a defendant violated the plaintiff's constitutional rights and that the violation was objectively unreasonable. *Club Retro, LLC*, 568 F.3d at 194; *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir. 2005).

Brocato argues that Plaintiff has not overcome his qualified immunity defense because Plaintiff has failed to state a cognizable claim against him and has failed to allege any objective unreasonableness.[12]

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[12] Plaintiff opposes the Rule 12(b)(6) motions on grounds that each of the individual defendants has committed criminal acts and participated in a criminal conspiracy to commit treason against him. (*See* Doc. 79 at 4-5; Doc. 81 at 4; Doc. 82 at 6-7;

(Brocato Mot. at 6.) The amended complaint asserts a broad claim of conspiracy to commit treason against Plaintiff. (*See* Am. Compl. at 14, ¶¶ 1-2.) As for Brocato, Plaintiff complains about an unsuccessful argument presented on appeal.[13] (*See id.* at 39-40, ¶¶ 106-07.)

Although plaintiffs do not need to plead sufficient facts to overcome an anticipated qualified immunity defense, *see Crawford-El v. Britton*, 523 U.S. 574, 595 (1998), they must allege sufficient facts to state a cognizable claim. To state a conspiracy claim under 42 U.S.C. § 1983, plaintiffs must allege facts to support "(1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990), *abrogated on other grounds as recognized by Martin v. Thomas*, 973 F.2d 449, 455 (5th Cir. 1992). A conspiracy actionable under § 1983 requires an agreement to deprive Plaintiff of his civil rights. *Dorward v. Ramirez*, No. 09-CV-00 I 8-D, 2009 WL 2777880, at 15 (N.D. Tex. Aug. 28, 2009).

Here, Plaintiff seems to claim that Brocato is liable as a conspirator because he made an [⊥ 21]

Doc. 83 at 2-3.) As noted, Plaintiff has no constitutional right to have anyone criminally prosecuted. *See Florance I*, 500 F. Supp. 2d at 635. To the extent he seeks to bring criminal charges against any defendant, he states no cognizable claim.

[13] Brocato represented the State of Texas in Collin County litigation in which Plaintiff challenged a court's jurisdiction over a citation issued to his daughter for being a minor in possession of alcohol. *See In re A.F.*, No. 05-05-01435-CV, 2006 WL 1728035 (Tex. App. - Dallas June 13, 2006, pet. denied) (showing representation by Brocato). [⊥ 21]

unsuccessful appellate argument, but he does not allege any facts showing that Brocato acted improperly or violated any constitutional right, much less one clearly established when Brocato made the argument.

Plaintiff's conclusory allegations are insufficient to state a conspiracy claim against Brocato upon which the Court can grant relief. As noted in the prior case, "a bare assertion of conspiracy will not suffice." *Florance I*, 500 F. Supp. 2d at 626 (quoting *Twombly*, 550 U.S. at 556). In order "to enter the realm of plausible liability", a plaintiff's allegations must cross "the line between the conclusory and the factual" as well as the line "between the factually neutral and the factually suggestive." *Twombly*, 550 U.S. at 557 & n.5. Merely labeling something as a conspiracy will not do. *See id.* at 555; *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Moreover, an alleged conspiracy to commit treason does not satisfy the requirement that there is an agreement to deprive Plaintiff of his civil rights.

Because Plaintiff has stated no viable constitutional claim against Brocato, he has failed to state a claim upon which relief can be granted. Brocato's motion to dismiss the individual capacity claims against him should be granted, and those claims should be dismissed with prejudice.

E. Treason

The Plano, Collin County, and Davis Defendants contend that Plaintiff's claims based on alleged treason fails to state a claim. (*See* Collin County Mot. at 5-6; Davis Mot. at 4-5; Plano Mot. at 5-6.) Treason is a criminal act against the United States. See 18

U.S.C. § 2381. Claims of treason cannot be pursued in a civil action. *Kendall v. U.S. Dept of Veteran Affairs*, No. CV07-103-S-EJL, 2008 WL 2397677, at *8 (D. Idaho June 10, 2008) (adopting recommendation of Mag. J.), *vacated in part on other grounds*, 2009 WL 5184127 (9th Cir. 2009); *Johnson-Bey v. Breniwal LLC*, [⊥ 22] No. 4:06-CV-67,2007 WL 2021861 (W.D. Mich. July 6, 2007) (adopting recommendation of Mag. J.). As noted, a claimed conspiracy to commit treason states no claim under § 1983 because the claim lacks the required agreement to violate Plaintiff's civil rights. Because alleged treason cannot impose civil liability under § 1983, the Court should grant the motions to dismiss the claims based on treason asserted against the Plano, Collin County, and Davis Defendants.

F. Absolute Privilege

Davis contends that Plaintiff cannot succeed on defamation[14] claims against him because absolute privilege protects statements made in filings in prior judicial proceedings and testimony he presented at Plaintiff's sentencing hearing. (Davis Mot. at 7-8.)

Although defamation claims arise under state rather than federal law, the Court may exercise supplemental jurisdiction over them. *See* 28 U.S.C. § 1367. In *Florance I*, Plaintiff asserted defamation claims based on the statements made in prior court filings. The Court recognized that "Texas law provides an absolute privilege to parties and witnesses who participate in judicial proceedings

[14] Defamation is simply another term for libel and slander. *See Michael v. Dyke*, 41 S.W.3d 746, 753 (Tex. App. – Corpus Christi 2001, no pet.). [⊥ 23]

from having to answer civil actions in damages for libel or slander." *Florance I*, 500 F. Supp. 2d at 644. The privilege covers "[a]ny communication, oral or written, uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot constitute the based of a civil action in damages for slander or libel." *See id.* (quoting *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1941)). Under Texas law, the privilege extends to "any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers in the case." *Id.* (quoting *James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. [⊥ 23] 1982)).

As in his prior action, Plaintiff primarily bases his defamation claims on statements made in court filings when Davis and his law firm represented Taylor against Plaintiff. (*See* Am. Compl. at 24-25.) He also claims here that Davis defamed him by provided [sic] testimony at his sentencing. (*See id.* at 25.) Plaintiff again takes issue with Davis describing him as a "litigation terrorist" and engaging in "litigation Jihad." (*See id.* at 24-25.)

Plaintiff argues in his response to the Davis motion that "immunity" does not apply because there is no factual basis for the assertions made. (*See* Doc. 81 at 6-8.) He also suggests that the term "terrorist" is so stigmatizing that it should be unacceptable even in court filings and proceedings. (*Id.* at 7.) Plaintiff does not refute that the statements were either made in court filings or when Davis provided testimony in a court proceeding. To the contrary, he concedes that

issue. (*Id.* at 6.) Consequently, the statements are absolutely privileged under state law. Because the privileged statements provide no basis for a defamation claim against Davis (or his law firm), the Davis motion to dismiss should be granted on that basis.

G. Res Judicata

Defendants Taylor, Kim, Smith, and Patten contend that Plaintiff's claims against them are barred by res judicata. (Plano Mot. at 6-7; Collin County Mot. at 7-8.)

To determine the res judicata effect of a prior federal judgment, the courts look to federal law. *Gulf Island-IV, Inc. v. Blue Streak-Gulf Is Ops*, 24 F.3d 743, 746 (5th Cir. 1994). Under the federal law of res judicata, also known as claim preclusion, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action ." *United States v. Davenport*, 484 F.3d 321, 326 (5th Cir. 2007) (quoting *Montana v. United States*, 440 U.S. 147,153 [⊥ 24] (1979)). The res judicata doctrine "bars all claims that were brought or could have been brought based on the operative factual nucleus." *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 938 n.1 (5th Cir. 2000). Before applying res judicata under federal law, the court must find that (1) the parties of both actions are either "identical or in privity"; (2) the prior judgment was rendered by a court of competent jurisdiction; (3) the prior case concluded with a final judgment on the merits; and (4) both actions involved the same claim or cause of action. *Davenport*, 484 F.3d at 326.

Defendants Taylor, Kim, Smith, and Patten were sued by Plaintiff in his prior federal action. That case ended with a final judgment on the merits by a court of competent jurisdiction. For these defendants (and others) there is substantial overlap between the allegations of the two cases, and the earlier action involves the same operative facts as this case. The four res judicata elements are present here.

Plaintiff argues that res judicata is inapplicable because of the significant legal difference between the Proper Capacity of a litigant and that person's Federal Capacity. (*See* Doc. 82 at 7-8.) Plaintiff has provided no legitimate authority for recognizing his view of the differing capacities, and the Court should reject it. Plaintiff is the same person who commenced the prior litigation. The motions to dismiss should be granted to the extent they are based on res judicata.

VII. RULE 12(f) and 12(e) MOTIONS

The State of Texas and the Fifth Court of Appeals seek to strike Plaintiff's amended com-plaint under Fed. R. Civ. P. 12(f) to the extent Plaintiff seeks to relitigate prior lawsuits. (State Mot. at 8.) The Plano, Collin County, and Davis Defendants similarly seek to strike the complaint due to its scandalous allegations as an alternative to their motions to dismiss. (*See* Plano Mot. at 8-9; Collin County Mot. 10-12; Davis Mot. at 10-12.) The United States and the Plano, Collin County, [⊥ 25] and Davis Defendants also request, in the alternative, that Plaintiff be required to file a more definite statement under Fed. R. Civ. P. 12(e). (*See* U.S. Mot. at 1; Plano Mot. at 8; Collin County Mot. 9; Davis Mot. at 9-10.) Based on the recommendations on their Rule 12(b)(6)

motions to dismiss, the motions to strike under Rule 12(0 and for a more definite statement under Fed. R. Civ. P. 12(e). [sic] should be denied as moot. *See Florance I*, 500 F. Supp. 2d at 645-46.

VIII. RECOMMENDATION

The *United States' Motion to Dismiss, or alternatively, For a More Definite Statement*, filed January 20, 2010, (doc. 53), and *Defendants', The State of Texas and the Fifth Court of Appeals, Motion to Dismiss Pursuant to Rule 12*, filed January 28, 2010, (doc. 55) should be **GRANTED** to the extent they seek dismissal under Fed. R. Civ. P. 12(b)(1), and the claims asserted against these defendants and the federal defendants sued in their official capacities should be dismissed without prejudice for lack of jurisdiction.

Defendants Anthony G. Brocato, Jr. and State of Texas' Motion to Dismiss for Insufficient Service of Process and Failure to State a Claim, filed February 12, 2010, (doc. 70), should be **GRANTED**, and the official capacity claims asserted against Brocato should be dismissed without prejudice for lack of jurisdiction under Rule 12(b)(1), and the individual capacity claims should be dismissed with prejudice pursuant to Rule 12(b)(6) for failure of Plaintiff to state a claim upon which relief can be granted.

Putative Defendant J.P. Court Precinct 3, Place 1 of Dallas County, Texas' Motion to Dismiss, filed January 20, 2010, (doc. 54); *Defendant City of Dallas's Motion to Dismiss*, filed February 4, 2010, (doc. 64); *Defendants Taylor, Miller, Kim, and Smith's Consolidated Rule 12 Motion to Dismiss*, filed February 17, 2010, (doc. 71); *Defendants Davis*

and Mathews, Stein, Shiels, [⊥ 26] *Pearce, Knott, Eden & Davis' Consolidated Rule 12 Motion to Dismiss*, filed February 18, 2010, (doc. 72); and *Defendants City of Plano, Plano Municipal Court, Judge Don Stevenson, Rodney D. Patten and Paige Mims' Consolidated Rule 12 Motion to Dismiss*, filed February 19, 2010, (doc. 73), should be **GRANTED** pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and Plaintiff's claims against these defendants should be dismissed with prejudice.

RJF's First and Standing Motion to Strike per FRCP 11(a) - DOJ and the Individual Defendants, filed February 24,2010, (doc. 76); *RJF's First and Standing Motion to Strike per FRCP 11(a) – DOJ*, filed February 24, 2010, (doc. 77); *RJF's Second and Standing Motion to Strike per FRCP 11(a) – State AG's Office and the "Individual" Defendants*, filed March 12, 2010, (doc. 84); and *RJF's Second and Standing Motion to Strike per FRCP 11(a) – State AG's Office*, filed March 19, 2010, (doc. 91) should be **DENIED**.

SO RECOMMENDED on this 25th day of May, 2010.

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE [⊥ 27]

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the

manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

2010 Jun 24—Unconsented-to magistrate's findings, conclusions, and recommendation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD JOHN FLORANCE, JR.,
Plaintiff,
vs.

DON BUSH, et al.,
Defendants.

No. 3:09-CV-1470-B-BH

Pretrial Management

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

Pursuant to Special Order No. 3-251, this case has been referred for pretrial management, including the determination of non-dispositive motions and issuance of findings of fact and recommendations on dispositive issues. Before the Court is the *Collin County Defendants' Motion for Sanctions*, ("Mot.") filed March 15, 2010, (doc. 85).[1] Based on the relevant filings and applicable law, the motion should be **GRANTED in part and DENIED in**

[1] Movants are Defendants Brenda Taylor, Courtney Miller, Yoon Kim, and Chad Smith (the "Collin County Defendants"). (*See* Mot. at 1.)

part, Plaintiff should be sanctioned, and this action should be DISMISSED in its entirety with prejudice.

I. BACKGROUND

Plaintiff Richard John Florance, Jr., ("Plaintiff' or "Florance") filed this action on July 16, 2009, against fifty-two defendants, including some that he had previously sued.[2] (*See* Compl., doc. 1, at 1-5 (listing defendants in caption).) On December 7, 2009, he amended his complaint to list fifty-three defendants.[3] (*See* Am. Compl., doc. 5, at 1-5, 20.) Plaintiff generally alleges a conspiracy to commit treason against him based upon his prior litigation, a "funny money" scam that differ- [⊥ 2] entiates between "Law of the Land" and "Law of the Sea" depending on whether there is gold and silver coin in general circulation, a "federal income tax scam", a "bogus 'underage consumption' case" against his daughter, a lien that led to his criminal conviction, various incidents in cases removed from state court, and libel and slander. (*See id.* at 14-21 (the "overview" of the conspiracy), 24-25 (identifying libelous and slanderous acts), 26-80 (providing additional detail about the treason and tyranny), 81-83 (summarizing

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[2] Plaintiff sued fifteen defendants under state and federal law for their alleged roles in or leading to earlier litigation. *See Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 628-31 (N.D. Tex. 2007) (*Florance I*). All claims were dismissed with prejudice, except for claims against unknown clerks that were dismissed for lack of personal jurisdiction. *See id.* at 624-25, 647-48.

[3] Plaintiff names the United States and the United States of America as separate defendants, and distinguishes between the "Proper" and "Federal" capacities for various defendants by using all capital letters for the "Federal Capacity". (*See* Am. Compl. at 1-5, 15.) [⊥ 2]

Plaintiff's positions).) Numerous motions to dismiss followed, and on May 25, 2010, dismissal of all claims against the moving defendants was recommended based on sovereign immunity, absolute privilege, res judicata, and failure to state a claim for municipal liability, conspiracy, treason, or against a non-jural entity. (See Doc. 92 at 17-24.) On the day they filed their motion to dismiss, the Collin County Defendants requested in writing that Plaintiff dismiss this lawsuit in its entirety and stop filing suit against them. (*See* Letter from Davis to Florance of 2/17/2010, attached as Ex. 1 to Mot.) On March 15, 2010, they moved for sanctions.

Plaintiff has previously been sanctioned or warned by several courts. In 2005, the United States Tax Court twice monetarily sanctioned him for filing "numerous frivolous documents and motions", advancing "shopworn arguments characteristic of tax-protester rhetoric that has been universally rejected by this and other courts", and instituting and maintaining the tax proceedings "primarily for delay." *See Florance v. C.I.R.*, T.C.M. (RIA) 2005-060 (2005) ($10,000.00 sanction), *aff'd*, 174 F. App'x 200 (5th Cir. 2006); *Florance v. C.I.R.*, T.C.M. (RIA) 2005-061 (2005) ($12,500.00 sanction), *aff'd*, 174 F. App'x 200 (5th Cir. 2006). The Fifth Circuit has ordered its Clerk of Court "to refuse to accept for filing any further pleadings or other instruments received from Florance or on his behalf without first obtaining the authorization of a judge of this court." *Florance v. C.I.R.*, 174 F. App'x 200, 201 (5th Cir. 2006). It has stricken a filing for inappropriate and abusive language, warned him that future filings containing inappropriate comments will be [⊥ 3] treated

similarly, and clarified that its prior sanction "applies to all 'pleadings and other instruments' from Richard Florance." *See In re: Florance*, No. 07-40129, unpub. ord. at 2, 4-5 (5th Cir. June 5, 2007). It has also warned Plaintiff about monetary sanctions and stricken an appeal with prejudice for inappropriate comments in filings. *Florance v. Buchmeyer*, 258 F. App'x 702, 702 (5th Cir. 2007). Both the Eastern District of Texas and this Court have also warned Plaintiff about inappropriate and abusive language in filings. *See Florance I*, 500 F. Supp. 2d at 628; *Texas v. Florance*, No. 4:06-CV-510, 2008 WL 839736, at *1 (E.D. Tex. Mar. 27, 2008). This Court has also sanctioned him for improper removal under 28 U.S.C. § 1447(c). *See Florance v. Taylor*, No. 3:06-CV-121-R, 2006 WL 567936, at *1-2 (N.D. Tex. Mar. 7, 2006) (ordering Plaintiff to pay costs and attorney's fees).

II. ANALYSIS

The Collin County Defendants seek sanctions against Plaintiff pursuant to Fed. R. Civ. P. 11 and the inherent powers of the Court for intentionally abusing the judicial system to harass state and federal governments and their officers. (Mot. at 1-2.) They seek an award of attorney's fees and costs, monetary sanctions payable to the Court, referral of this matter for criminal investigation, filing restrictions, a finding that Plaintiff is a vexatious litigant under Texas law, and any other sanction deemed appropriate to effectively deter improper conduct by Plaintiff. (Mot. at 8-9.)

A. Rule 11

Rule 11(b) provides that by presenting a filing to a court, attorneys and *pro se* litigants are certifying that to the best of their belief, after reasonable inquiry, (1) the filing is not being presented for an improper purpose, such as harassment, delay, or increasing costs; (2) any claims and/or defenses in the filing are supported by either existing law or by a nonfrivolous argument for changing existing law or establishing new law; and (3) factual contentions have or will likely have evidentiary [⊥ 4] support. The purpose of the rule is to "deter baseless filings in district court", *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), and "to spare innocent parties and overburdened courts from the filing of frivolous lawsuits", *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987). After notice and opportunity to respond,[4] courts finding a Rule 11(b) violation may impose appropriate sanctions. Fed. R. Civ. P. 11(c)(1). These may include monetary and injunctive sanctions, *Farg-uson v. MBank Houston, N.A.*, 808 F.2d 358, 359-60 (5th Cir. 1986), and even dismissal, *see Jimenez v. Madison Area Technical Coll.*, 321 F.3d 652, 657 (7th Cir. 2003). Courts have a duty to impose the least severe sanction that is sufficient to deter future conduct. *Mendoza v. Lynaugh*, 989 F.2d 191, 196 (5th Cir. 1993); Fed. R. Civ. P. 1 1(c)(4).

1. *Safe Harbor Provision*

Fed. R. Civ. P. 11 (c)(2) provides that a party may seek sanctions by filing a stand-alone motion describing specific sanctionable conduct. The rule

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[4] A proper sanction motion under Rule 11 satisfies the notice requirement. [⊥ 5]

contains a safe harbor provision which requires that the motion "be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." This requirement is strictly construed and substantial compliance is insufficient. *Cf. In re Pratt*, 524 F.3d 580, 586-88 (5th Cir. 2008) (addressing "substantially identical" bankruptcy Rule 9011). Informal notice and opportunity to withdraw is not an adequate substitute for serving a copy of the motion at least twenty-one days before filing the motion with the court. *Id.* A motion for Rule 11 sanctions is appropriately denied when the movant fails to comply with this requirement. *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000). The movant has the burden to show compliance with the safe harbor provision. *See* [⊥ 5] *Harris v. Auxilium Pharms., Inc.*, 664 F. Supp. 2d 711, 724 (S.D. Tex. 2009).

Here, the Collin County Defendants filed their motion for sanctions separately from their motion to dismiss. The certificate of service indicates that it was served on Plaintiff on the same date it was filed with the Court. Although the defendants sent Plaintiff a letter warning of Rule 11 sanctions dated February 17, 2010, an informal letter does not of itself comply with the service requirements. The Collin County Defendants have not shown that they have complied with the safe harbor provision, and their motion for Rule 11 sanctions may be denied on this basis.

2. *Sua Sponte Sanctions*

A court may impose sanctions on its own initiative under Rule 11 (c)(3) even after a party has moved for Rule 11 sanctions without complying with the safe harbor provision, however. *See Brunig v. Clark*, 560 F.3d 292, 297-98 & n.18 (5th Cir. 2009); *Elliott v. Tilton*, 64 F.3d 213,216(5th Cir. 1995). Although Rule 11(c)(3) requires courts to issue a show cause order before *sua sponte* imposing sanctions, a recommendation satisfies that requirement when it describes the sanctionable conduct, recommends that sanctions be imposed, and provides an opportunity to show cause why sanctions may not be warranted. *See Brunig*, 560 F.3d at 297-98 & n.18.

In this case, Plaintiff has again sued the same defendants as in *Florance I* as well as their attorneys, the Fifth Circuit judges who presided over his appeal, and several others. By his own count (*see generally* Am. Compl.), this action encompasses twenty-seven appellate eases, eighteen trial cases, and two prior actions in this Court – *Florance I* and *Florance v. United States*, No. 3:09-CV-1732-B, 2009 WL 5173956 (N.D. Tex. Dec. 31, 2009) (dismissing action due to sovereign immunity). Plaintiff's repeated attempts to re-litigate prior cases suggest that he filed this action to harass the defendants in violation of Rule 11 (b)(1). *See Bryant v. Plains Nat'l Bank of Lubbock, Tex.*, No. 5:05-CV-034-J, 2005 WL 1704946, at *3 (N.D. Tex. July 19, 2005) ("Repeatedly suing [⊥ 6] the same parties over and over, asserting the same factual claims and legal causes of action, after and in spite of the entry of multiple adverse final judgments . . . is harassment and a

gross abuse of the judicial process.").

It also appears that Plaintiff has violated Rule 11(b)(2) by asserting legal contentions that are not warranted by existing law or by a nonfrivolous argument for relief despite the current state of the law. He has again asserted the same or similar claims that were found to be without merit in *Florance I* against some of the same defendants. *See generally* 500 F. Supp. 2d at 626-45. His tax arguments have been unsuccessful for him since at least 2005 when he was sanctioned for making frivolous and groundless arguments. *See Florance v. C.I.R.*, T.C.M. (RIA) 2005-060 (2005), *aff'd*, 174 F. App'x 200 (5th Cir. 2006).[5] Here, he again alleges a federal income tax scam in addition to a conspiracy to commit treason against him, a "funny money scam", law of the sea and land, federal and proper capacity. (*See* Am. Compl. at 14-17, 22-23, 81-82). His unsupported legal contentions have repeatedly been found so lacking in "colorable merit" that there is no need to refute them with detailed analysis. *Cf. Crain v. C.I.R.*, 737 F.2d 1417, 1417 (5th Cir. 1984). *See also Taylor v. C.I.R.*, 350 F. App'x 913, 914-16 (5th Cir. 2009) (affirming finding that claimed income tax scam based on "taxpayer means fiduciary" is

[5] Plaintiff's complaint reflects his awareness that other litigants who made similar frivolous tax arguments were sanctioned on the basis of those arguments. (*See* Am. Compl. at 74-77 (identifying other tax cases resulting in sanctions – *Collard v. C.I.R.*, 354 F. App'x 24 (5th Cir. 2009) ($8,000); *Taylor v. C.I.R.*, 350 F. App'x 913 (5th Cir. 2009) ($16,000); *Braquet v. C.I.R.*, 336 F. App'x 432 (5th Cir. 2009) ($8,000); *Stearman v. C.I.R.*, 436 F.3d 533 (5th Cir. 2006) ($37,000); *Wallis v. Comm'r of IRS*, 203 F. App'x 591 (5th Cir. 2006) ($8,000); *O'Connor v. C.I.R.*, 163 F. App'x 513 (9th Cir. 2006) ($3,000); *Tello v. C.I.R.*, 410 F.3d 743 (5th Cir. 2005) ($8,500)). [⊥ 7]

frivolous, groundless, and sanctionable). Plaintiff's legal contentions appear to violate Rule 11 (b)(2).

Rule 11 sanctions may be appropriate when a *pro se* litigant has a history of submitting multiple frivolous claims. *See Mendoza*, 989 F.2d at 195-97. *Pro se* litigants have "no license to harass [⊥ 7] others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson*, 808 F.2d at 359. Because Plaintiff has engaged in sanctionable conduct by filing this action for purposes of harassment and knowingly making or reasserting frivolous legal contentions, sanctions are appropriate. Prior sanctions against Plaintiff have included warnings, attorney fees, filing restrictions, and significant monetary fines, totaling $22,500, by several courts. None of these sanctions have been effective in deterring his continued litigation abuses. More severe sanctions are therefore warranted to deter future conduct.[6] The Court should dismiss this action with prejudice, assess a fine of $ 100 per defendant in this case ($5300), and prohibit Plaintiff from filing any new action in this Court until he has paid that sanction *and* obtained leave from a judge of this Court to file the action. Additionally, because a "litigious plaintiff pressing a frivolous claim . . . can be extremely costly to the defendant and can waste an inordinate amount of court time", Plaintiff should be enjoined from pursuing "any future litigation on

[6] When courts act on their own under Rule 11, available sanctions are limited to "nonmonetary sanctions or a monetary penalty payable to the court" – an award of attorney's fees or other expenses is not appropriate. *Marlin v. Moody Nat'l Bank NA.*, 533 F.3d 374, 379 (5th Cir. 2008); *accord* Fed. R. Civ. R. 11(c)(4). [⊥ 8]

any cause of action arising from the fact situation at issue in this case" given that he has sued various defendants over the years and "has had a full opportunity to present and litigate his claims". *See Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980).

This recommendation satisfies the show cause requirement of Rule 11(c)(3), and if Plaintiff "chooses to show cause why sanctions may not be warranted in this case", he may do so in his objections. *See Brunig*, 560 F.3d at 297-98 & n.18.

B. Inherent Power

Defendants also generally move for sanctions under the Court's inherent power. (Mot. at 1.) Courts possess the inherent power "to protect the efficient arid orderly administration of justice [⊥ 8] and . . . to command respect for the court's orders, judgments, procedures, and authority." *In re Stone*, 986 F.2d 898, 902 (5th Cir. 1993). Included in this inherent power is "the power to levy sanctions in response to abusive litigation practices." *Id.* Upon a finding of bad faith or a willful abuse of the judicial process, federal courts have the inherent, discretionary authority to dismiss an action. *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1417 (5th Cir. 1995). While the courts "exercise caution" in invoking their inherent powers and should "ordinarily" rely on a rule or statute rather than their inherent power, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991), they retain discretion to select the appropriate authority for sanctions, *see First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 516 (6th Cir. 2002). If a court finds bad faith, it

may impose an appropriate sanction under its inherent powers when Rule 11 sanctions are unavailable due to noncompliance with the safe harbor provision. *Elliott v. Tilton*, 64 F.3d 213, 216-17 (5th Cir. 1995); *First Bank of Marietta*, 307 F.3d 501 at 511-19.

Bad faith conduct includes conduct that is motivated by improper purposes such as harassment or delay. *Coghlan v. Starkey*, 852 F.2d 806, 814 (5th Cir. 1988). In this respect, bad faith "resembles" the requirements of Rule 11(b)(1). *Chambers*, 501 U.S. at 46 n.10. As already discussed, Plaintiff has engaged in harassing conduct, and his conduct reflects that he filed this action in bad faith and has willfully abused the judicial process. Consequently, the Court may sanction him under its inherent powers. Imposition of the sanctions recommended under Rule 11(c)(3) sanctions is also appropriate under the Court's inherent powers.[7]

III. CONCLUSION

The Collin County Defendants 'Motion for Sanctions, filed March 15, (doc. 85) should [⊥ 9] be **GRANTED in part and DENIED in part**, and Plaintiff should be sanctioned under Fed. R. Civ. R. 11(c)(2) and the inherent powers of the Court. This action should be *sua sponte* **DISMISSED** in its entirety with prejudice, [sic] Plaintiff should be fined

[7] To the extent Plaintiff is entitled to additional notice and an opportunity to be heard prior to the dismissal of this action as a sanction, *see Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962), the period for lodging an objection provides adequate notice and an opportunity for him to contest dismissal and the imposition of sanctions. [⊥ 9]

$5300, [sic] he should be prohibited from filing a new action in this Court until he has paid that sanction *and* obtained leave from a judge of this Court to file the action. He should also be barred from pursuing future litigation arising from the facts leading to this action.

SO RECOMMENDED on this 24th day of June, 2010.

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted

or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

/s/ Irma Carrillo Ramirez
IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

Rule 14.1(i)(iii)—Rehearing, or other extension

None.

Rule 14.1(i)(iv)—Judgment of different date

None.

Rule 14.1(i)(v)—Statutes and Rules

Title 28

§ 451

Section 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The terms "district" and "judicial district" means the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

28 U.S.C. § 451.

§ 453

Section 453. Definitions

Each justice or judge of the United States shall take

the following oath or affirmation before performing the duties of his office: "I, ___ XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God."

28 U.S.C. § 453.

§ 711

Section 711. [appellate court] Clerks and employees

(a) Each court of appeals may appoint a clerk who shall be subject to removal by the court.

(b) The clerk, with the approval of the court, may appoint necessary deputies, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal by the clerk with the approval of the court.

(c) The clerk shall pay into the Treasury all fees, costs and other moneys collected by him and make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

28 U.S.C. § 711.

§ 951

Section 951. Oath of office of clerks and deputies

Each clerk of court and his deputies shall take the following oath or affirmation before entering upon their duties: "I, ___ XXX, having been appointed ___, do solemnly swear (or affirm) that I will truly and faithfully enter and record all orders, decrees, judgments and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God."

28 U.S.C. § 951.

§ 956

Section 956. [General provisions] Powers and duties of clerks and deputies

The clerk of each court and his deputies and assistants shall exercise the powers and perform the duties assigned to them by the court.

28 U.S.C. § 956.

Rules of Appellate Procedure

FED. R. APP. P. 27(b).

(b) ***Disposition of a Motion for a Procedural Order.***
The court may act on a motion for a procedural order — including a motion under Rule 26(b) — at any time without awaiting a response, **and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions.** [emphasis added.] A party adversely affected by the court's, or the clerk's, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.

5TH CIR. R. 27.

27.1 Clerk May Rule on Certain Motions.

Under FED. R. APP. P. 27(b), the clerk has discretion to act on, in accordance with the standards set forth in the applicable rules, or to refer to the court, the procedural motions listed below. The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED. R. APP. P. 40.

27.1.1 To extend the time for:
filing answers or replies to pending motions;
paying filing fees;

filing motions to proceed in forma pauperis;

filing petitions for panel rehearing and rehearing en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se;

filing briefs as permitted by 5TH CIR. R. 31.4;

filing bills of costs; and

filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1.3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals. [bold emphasis added]

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by FED. R. APP. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under FED. R. APP. P. 29 (see 5TH CIR. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for:

briefs under FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32;

petitions for rehearing en banc and panel rehearing under FED. R. APP. P. 35(b)(2), and 40(b);

certificates of appealability and motions for permission to file second or successive habeas corpus applications under 28 U.S.C. §§ 2254 and 2255, under 5TH CIR. R. 22; petitions for permission to appeal under 5TH CIR. R. 5; and

petitions for mandamus and extraordinary writs under 5TH CIR. R. 21.

27.1.17 To proceed in forma pauperis, see FED. R. APP. P. 24 and 28 U.S.C. § 1915.

27.1.18 To appoint counsel or to permit appointed counsel to withdraw.

27.1.19 To obtain transcripts at government expense.

27.2 Single Judge May Rule on Certain Motions. *Pursuant to FED. R. APP. P. 27(c), any single judge of this court has discretion, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in FED. R. APP. P. 40, to take appropriate action on the following procedural motions:*

27.2.1 The motions listed in 5TH CIR. R. 27.1 that have been referred to a single judge for initial action, or for single judge reconsideration of a ruling made by the clerk, but the judge is not limited to the time restrictions in 5TH CIR. R. 27.1.1.

27.2.2 To permit interventions in agency proceedings pursuant to FED. R. APP. P. 15(d).

27.2.3 To act on applications for certificates of appealability under FED. R. APP. P. 22(b) and 28 U.S.C. § 2253 except for death penalty cases where a three judge panel must act.

27.2.4 To extend for good cause the times prescribed by the Federal Rules of Appellate Procedure or by the rules of this court except for enlarging the time for initiating an appeal, see FED. R. APP. P. 26(b).

27.2.5 To substitute parties under FED. R. APP. P. 43.

27.2.6 To exercise the power granted in FED. R. APP. P. 8 and 9, respecting stays, or injunctions, or releases in criminal cases pending appeal and subject to the restrictions set out in those rules; and

to exercise the power granted in FED. R. APP. P. 18, respecting stays pending review of agency

decisions or orders, subject to the restrictions on the power of a single judge contained in that rule.

27.2.7 To stay the issuance of mandates or to recall same pending certiorari.

27.2.8 To expedite appeals.

27.2.9 To strike a nonconforming brief or record excerpts as provided in 5TH CIR. R. 32.5 and to strike other papers not conforming to the FED. R. APP. P. and 5TH CIR. R.

27.3 Emergency Motions.

Counsel ordinarily should file emergency motions or applications with the clerk rather than with an individual judge.

Where time does not permit filing a motion or application by mail or hand delivery, counsel may contact the clerk by telephone and request permission to file by fax;

if fax filing is impractical, then the clerk may, in extraordinary cases, accept and forward to the court a telephone communication;

thereafter, counsel must file the motion in writing with the clerk as promptly as possible (whether or not previously faxed).

The motion, application, or contact must contain a brief account of the prior actions of this or any other court or judge to which the motion or application, or a substantially similar or related petition for relief, has been submitted.

27.4 Form of Motions.

Parties or counsel must comply with the requirements

of FED. R. APP. P. 27 including the length limits of FED. R. APP. P. 27(d)(2). Except for purely procedural matters, motions must include a certificate of interested persons as described in 5TH CIR. R. 28.2.1. Where a single judge or the clerk may act only an original and 1 copy need be filed. All motions requiring panel action require an original and 3 copies. ***All motions must state that the movant has contacted or attempted to contact all other parties and must indicate whether an opposition will be filed. [emphasis in original]***

27.5 Motions To Expedite Appeal.
Such motions are presented in the same manner as other motions. Only the court may expedite an appeal and only for good cause.
If an appeal is expedited, the clerk will fix a briefing schedule unless a judge directs a specific date.

"Consent to Proceed" form

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

_____ **DIVISION**

_____
Plaintiff

v. _____ Docket No.

_____
Defendant

CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above captioned civil matter hereby waive their right to proceed before a Judge of the United States District Court and consent to have a United States Magistrate Judge conduct any and all further proceedings in the above styled case (including the trial) and order entry of a final judgment.

Party or Counsel of Record Date

_____

_____

_____

NOTE: Return this form to the District Clerk only if it has been executed by all parties to the case.

ORDER OF REASSIGNMENT

IT IS HEREBY ORDERED that the above captioned matter be reassigned to the United States Magistrate Judge _____ for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and the foregoing consent of the parties.

DATED:_____

_____
UNITED STATES DISTRICT JUDGE

TRIALS BY THE UNITED STATES MAGISTRATE JUDGE

28 U.S.C. § 636(c)(1), Fed. R. Civ Proc 73(b) provide that upon the consent of all parties in a civil case, the district judge may enter an order reassigning the civil case to a magistrate judge. Miscellaneous Order #6 of the Northern District of Texas provides that it is the plaintiff's obligation to attach a copy of this notice to the complaint and summons, when served.

NOTICE OF RIGHT TO CONSENT TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE

You have the opportunity to consent to the exercise of civil jurisdiction over your case by a magistrate judge. If all parties involved in your case consent, the presiding district judge may enter an order of transfer, and reassign your case to a magistrate judge.

Your decision to consent, or not to consent, to the reassignment of your case to a magistrate judge is entirely voluntary and without any adverse consequences if you choose not to consent. Your decision should be communicated to the clerk of the district court using the form entitled: *Consent to Proceed Before a United States Magistrate Judge* ("consent form"). It is preferred that all parties submit the consent form jointly, but it may be submitted individually if necessary. A district judge or magistrate judge will not be informed of any party's response to this notice unless all parties have consented to the referral of the matter to a magistrate judge.

Even if all parties consent to the exercise of civil jurisdiction by a magistrate judge, the district judge may choose not to enter an order reassigning the case to a magistrate judge. However, if the district judge does enter an order of transfer, and reassigns your case to the magistrate judge, the magistrate judge is then authorized to conduct any or all proceedings in the case, including a jury or non-jury trial, and order the entry of a final judgment. Upon entry of judgment by the magistrate judge in any case referred under 28 U.S.C. § 636(c)(1), 28 U.S.C. § 636(c)(3) provides that "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court."

If you wish to consent to proceed before a United States magistrate judge and are a registered electronic filer in the Northern District of Texas, you may access an electronic version of the consent form via the court's CM/ECF system under Civil Events, Other Filings. Detailed instructions on how to complete the electronic version of the consent form are provided in the ECF User Guide located on the court's website at www.txnd.uscourts.gov, Filing / ECF Info. Completing the electronic version of the consent form will electronically submit the form.

The consent form may also be obtained in paper form from any of the clerk's seven divisional offices.

ND TX R. 16.2

LR 16.2 Authority of Magistrate Judges as to Scheduling Orders

Unless the presiding judge otherwise directs, a magistrate judge shall have the authority under Fed. R. Civ. P. 16(b) to enter and modify scheduling orders.

Special Order 3-251 (2006 Mar. 8)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

SPECIAL ORDER NO. 3-251

The Clerk's Office is directed to automatically refer [sic] at case opening certain types of matters to the resident magistrate judge for decisions as to non-dispositive matters and for findings and recommendations as to dispositive matters. In a division having more than one magistrate judge, the Clerk's Office will automatically refer each such matter to the magistrate judge to whom the case is preliminarily assigned.

The chart attached to this Order specifies each district judge's referral directive to the Clerk's Office. A district judge may modify the directive as it relates

to that judge by notifying the Clerk's Office in writing. The Clerk's Office will modify the chart as necessary to reflect any such modification.

SO ORDERED this 8 day of March, 2006.

/s/ A. Joe Fish
A. JOE FISH, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

[N.B. Implementing this are charts of various dates, including 22 Sep 2006, 18 Jan 2007, 26 Feb 2007, 30 Nov 2007, and 9 Jan 2009. *RJF*]

Miscellaneous Order No. 6.

1982 Feb. 5.

U.S. DISTRICT COURT [1]
NORTHERN DISTRICT OF TEXAS
FILED

MAR – ?? 1982

CLERK, U.S. DISTRICT COURT
BY: /s/ *Pat Spears*
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MISCELLANEOUS ORDER NO. 6

ORDER FOR THE ADOPTION OF RULES FOR THE EXERCISE OF POWERS AND PERFORMANCE OF DUTIES BY UNITED STATES MAGISTRATES [⊥ 2]

Rule 1

Powers and Duties of Magistrates under 28 U.S.C. §636(a)

All United States magistrates serving within the territorial jurisdiction of the Northern District of Texas shall have the power and duty to:

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[1] [N.B. The only things legible in the file stamp are "MAR," "1982," and "*Pat Spears*." Everything else is presumed. *RJF*]

(a) Process criminal complaints and issue appropriate warrants or summons.

(b) Issue search warrants.

(c) Conduct initial appearances.

(d) Impose conditions of release and admit persons to bail.

(e) Impose conditions of bail for material witnesses.

(f) Conduct preliminary hearings.

(g) Conduct removal hearings and issue warrants of removal.

(h) Administer oaths and affirmations; take acknowledgments, affidavits and depositions.

(i) Conduct preliminary hearings, by whatever name called, in proceedings for the revocation of parole, mandatory release or probation.

(j) Issue administrative inspection warrants.

(k) Hold to security of the peace and for good behavior under 18 U.S.C. §3043.

(l) Discharge indigent prisoners or persons imprisoned for debt under process or execution issued by a federal court, pursuant to 18 U.S.C. §3569 and 28 U.S.C. §2007.

(m) Institute proceedings against persons violating certain Civil Rights Statutes under 42 U.S.C. §1987 and 1989.

(n) Settle and certify the non-payment of seaman's wages and conduct proceedings for the disposition of deceased seaman's effects

under 42 U.S.C. §603, 604, 627, 628.

(o) Enforce awards of foreign consul and arbitrate differences between captains and crews of vessels of the consul's nations under 22 U.S.C. §258a.

(p) Upon the consent of the defendant, conduct trial of persons accused of, and sentence persons convicted of misdemeanor offenses, including petty offenses (a misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500.00, or both) pursuant to 18 U.S.C. §3401. Upon the filing with the clerk of an indictment, information or complaint charging a misdemeanor other than a petty offense such indictment or information shall be referred to a United States District Judge who may in turn refer such non-petty misdemeanor charge to a United States magistrate for trial and disposition. Any citation or violation notice charging a petty offense upon which the accused requests a trial, and any citation or violation notice charging a petty offense to which the accused fails to respond within a reasonable time shall be referred to a United States magistrate for trial and disposition.

(1) If the defendant consents to disposition of the case by the magistrate specifically waiving trial before a judge of the district court, the magistrate shall proceed as provided in Rule 2(c), Rules of Procedure for the Trial of Misdemeanors Before

United States Magistrates. If the defendant [⊥ 3] does not consent to disposition of the case by the magistrate, the magistrate shall:

(a) If the defendant is charged with a petty offense for which no sentence of imprisonment will be imposed, order the defendant to appear before a judge of the district court for further proceedings on notice.

(b) In all other cases, proceed in accordance with the provisions of Rule 5(c), Federal Rules of Criminal Procedure.

(2) All misdemeanor cases, except petty offenses, transferred to the Northern District of Texas under the provisions of Rule 20, Federal Rules of Criminal Procedure shall be referred to a United States District Judge who may in turn refer such matter to a United States magistrate for plea and sentence as provided for in Rule 1(p), supra.

(3) Appeals. An appeal from a judgment and conviction or from a decision or order of a magistrate shall be taken in the manner within the time provided in Rule 7(b), Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. If a transcript of the proceedings before the magistrate is desired, the parties shall designate those portions of the proceedings to be transcribed, as provided in Rule 10(b),

Federal Rules of Appellate Procedure. When the transcript has been certified by the magistrate he shall forward it to the clerk's office for filing and shall at the same time notify the judge and the parties of the filing of the transcript. Within fifteen days of the date on which the transcript is [⊥ 4] filed in the clerk's office, or if there is to be no transcript, within fifteen days of the filing of the notice of appeal with the magistrate, the appellant shall serve and file a brief which shall enumerate each reversible error claimed to have occurred in the proceedings before the magistrate. Within fifteen days of service of appellant's brief the appellee shall serve and file a brief. The appellant may serve and file a reply brief within seven days of service of appellee's brief. Copies of all briefs shall be submitted to the judge at the time of filing. The judge to whom the appeal is assigned may hear oral argument or may decide the appeal on the briefs. Any party desiring oral argument shall so specify in his brief, but oral argument shall be discretionary with the judge, notwithstanding request therefor by one or more of the parties.

(q) Exercise all other powers and perform all other duties conferred or imposed upon United States magistrates or United States commissioners by law or by the Federal Rules of Criminal Procedure. [⊥ 5]

Rule 2

Additional Powers and Duties of Magistrates under 28 U.S.C. §636(b)

Upon entry of an order of reference by a District Judge, or when required to do so under the provisions of a local rule or general order of this Court, a magistrate may perform any of the following additional duties, and shall have all powers necessary to perform such duties. Provided, however, that no part time magistrate specially designated to perform such additional duties, nor any partner or associate of such part time magistrate, shall appear as counsel in any case before this Court when to do so would constitute a violation of the Conflict of Interest Rules for Part Time Magistrates promulgated by the Director of the Administrative Office of the United States Courts [§1.3(b)(i)-(viii), Regulations of the Director of the Administrative Office of the United States Courts Governing the Administration of the United States Magistrates System].

(a) Criminal Proceedings.

(1) General supervision of the criminal calendar, including calendar calls and motions to expedite or postpone the trial of the case.

(2) Conduct of post indictment and post information arraignments, acceptance of not guilty pleas, and the ordering of a presentence report on a defendant who signifies the desire to plead guilty.

(3) Conduct of pretrial conferences, omnibus

hearings, and related proceedings.

(4) Hearing and deciding motions by the Government to dismiss an indictment or information without prejudice to further proceedings, and any other [⊥ 6] motion or pretrial matter which is not specifically enumerated as an exception in 28 U.S.C. §636(b)(1)(A).

(5) The review of motions to dismiss or quash an indictment or information made by a defendant and motions to suppress evidence, including the conduct of all necessary evidentiary and other hearings or oral argument thereon, and the submission of reports and recommendations to the district judge assigned to the case.

(6) Conduct of probation revocation hearings and submission of a report and recommendations to the district judge to whom the case is assigned.

(7) Receipt of grand jury returns, in accordance with Rule 6(f), Federal Rules of Criminal procedure.

(8) Conduct hearings and issue orders upon motions arising out of grand jury proceedings including, but not limited to, enforcement or modification of subpoenas, lineups, finger and palmprinting, voice identification, medical examination and the taking of blood, urine, fingernail, hair and body secretion samples with appropriate medical safeguards.

(9) Accept waivers of indictments and permit amendments of informations.

(10) Establish a bail schedule for petty offenses as defined in 18 U.S.C. §1(3) providing for the posting of collateral, waiver of appearance before the court and consent to forfeiture of collateral. [⊥ 7]

(11) Conduct extradition proceedings under 18 U.S.C. §3184.

(b) Prisoner Petitions.

(1) Review of petitions of state prisoners seeking post conviction relief from state custody under 28 U.S.C. §2254 and other petitions of state prisoners seeking to attack the fact or duration of their state confinement, the issuance of orders to show cause and other necessary orders or writs to obtain a complete record, the conduct of evidentiary and other bearings and oral arguments, performing all other duties authorized to be formed by a magistrate under the Rules Governing §2254 Cases, and the preparation and submission to the district judge to whom the case is assigned of a report and recommendations as to the appropriate disposition of the petition.

(2) Review of motions of federal prisoners for vacation of sentence under 28 U.S.C. §2255, and review of other petitions of federal prisoners for relief from custody, the issuance of orders to answer the

motion or petition and other orders necessary to the magistrate's review of such motion or petition, the conduct of evidentiary and other hearings and oral arguments, performing all other duties authorized to be performed by a magistrate under the Rules Governing §2255 Cases, and the preparation of a report and recommendations to the district judge to whom the case is assigned as to the appropriate disposition of the motion or petition. [⊥ 8]

(3) The review of civil suits by prisoners for deprivation of civil rights arising out of conditions of confinement under 42 U.S.C. §1983 and related statutes; the conduct of evidentiary and other hearings and oral arguments and the preparation of reports and recommendations to the district judge to whom the case is assigned.

(4) Taking on-site depositions, gathering evidence, conducting pretrial conferences, and serving as a mediator at the holding facility in connection with civil rights suits filed by prisoners contesting conditions of confinement under 42 U.S.C. §1983 and related statutes.

(5) Conduct of periodic reviews of proceedings to insure compliance with previous orders of the Court regarding conditions of confinement.

(6) Review of prisoner correspondence.

(c) Civil Proceedings.

(1) General supervision of the civil calendar, including the handling of calendar calls and motions to expedite or postpone the trial of cases.

(2) Conduct of preliminary and final pretrial conferences, status calls and settlement conferences, and the formulation or preparation of pretrial orders.

(3) Hearing and determining pretrial procedural and discovery motions and any other motion or pretrial matter which is not specifically enumerated as an exception in 28 U.S.C. §636(b)(1)(A).

(4) The review of motions:

(A) for injunctive relief,

(B) to dismiss for failure to state a claim upon which relief may be granted, [⊥ 9]

(C) to involuntarily dismiss [sic] an action,

(D) to vacate or set aside default judgments,

(E) to dismiss or permit the maintenance of a class action,

(F) for judgment on the pleadings, or

(G) for summary judgment

including the conduct of all necessary evidentiary and other hearings or oral arguments thereon, and the submission of reports and recommendations to the District Judge assigned to the case.

(5) Acceptance of petit jury returns in the absence or disability of the trial judge.

(6) Examining judgment debtors under Rule 69, Federal Rules of Civil Procedure.

(7) Conduct proceedings for the enforcement of civil penalties under the Federal Boat Safety Act, 46 U.S.C. §1451-1489.

(8) Issuance of orders prior to ratification of sale in mortgage foreclosure proceedings on properties financed through government loans.

(9) Review of default judgments and conduct of inquests on damages in cases involving default judgments.

(10) Appoint persons to serve process pursuant to Rule 4(C), Federal Rules of Civil Procedure, except that, as to in rem process, such appointments shall be made only when the United States Marshal, or his deputies, are not immediately available to execute such process, and the individual appointed has been approved by the United States Marshal for such purpose. [⊥ 10]

(d) Special Master References.

(1) Serving as a special master in accordance with Rule 53, Federal Rules of Civil Procedure: hearing testimony and submitting a report and findings on complicated issues in jury cases or in matters of account, difficult computation

of damages and exceptional conditions in nonjury cases.

(2) Conducting hearings and resolving specific issues in patent, antitrust, and other complex cases where there are a great many issues, claims and documents, or in multiple disaster and class action cases where there are numerous claimants and diverse claims.

(3) Serving as a special master in any matter with the consent of the parties.

(4) Serving as a commissioner to determine compensation and assess damages in land condemnation cases under Rule 71A(h), Federal Rules of Civil Procedure.

(5) Conducting evidentiary hearings and preparing findings in employment discrimination cases under Title VII of the Civil Rights Act of 1964 whenever a judge has not scheduled a case for trial within 120 days after issue has been joined and upon reference to the magistrate by a District Judge.

(e) Administrative Proceedings.

(1) Reviewing the record of administrative proceedings in suits for judicial review of final decisions of administrative agencies and submitting to the district judge to whom the ease is assigned a report and recommendations as to (a) whether there are any defects in the agency proceedings which [⊥ 11] rise to the level of a

deprivation of due process or a violation of a statute or regulation, (b) whether there should be a remand to the agency for additional factual determinations to complete the record, and (c) whether there is substantial evidence in the record to support the ultimate decision of the agency.

(f) Miscellaneous Duties.

(1) The review of petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act.

(2) Issuance of subpoenas and writs of habeas corpus ad testificandum and ad prosequendum or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings in civil and criminal cases.

(3) Coordination of the Court's efforts in the promulgation of local rules and procedures and the administration of the forfeiture of collateral systems, as well as in similar or related matters.

(4) Supervision of proceedings on requests for letters rogatory in civil and criminal cases.

(5) Conduct of voir dire and selection of juries for district judges in civil and criminal cases with consent of the parties and the District Judge.

(6) Exoneration or forfeiture of bonds and bail.

(7) Service as a member of the district's Speedy Trial Act Planning Group, (including service as the reporter).

(8) Administer the Court's Criminal Justice Act Plan, including maintenance of a list of eligible attorneys, appoint attorneys and approve vouchers [⊥ 12] for compensation and expenses.

(9) Any other duties assigned by the Court, or any Judge thereof, which are not inconsistent with the Constitution and laws of the United States. [⊥ 13]

Rule 3

Conduct of trials and Disposition of Civil Cases Upon Consent of the Parties, 28 U.S.C. §636(c)

Upon the consent of the parties and the approval and referral of the district judge to whom the ease is assigned a full-time magistrate or a part-time magistrate who serves as a full-time judicial officer may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or nonjury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. §636(c). In the course of conducting such proceedings a magistrate may hear and determine any and all pretrial and posttrial motions which are filed by the parties, including case-dispositive motions.

(a) In general

In the course of conducting proceedings in accordance with 28 U.S.C. §636(c) a

magistrate shall conform to all applicable provisions of federal statutes and rules, and to the general procedural rules of this court.

(b) Special provisions for the disposition of cases

(1) Notice.

The clerk of court shall notify the parties in all civil cases that they may consent to have a magistrate conduct any or all proceedings in the case and order the entry of a final judgment. Such notice shall be given on the form attached hereto as Exhibit 1 and shall be handed or mailed to the plaintiff or his representative at the time an action is filed and to other parties as attachments to copies of the complaint and summons, when served. The clerk may [⊥ 14] serve the parties with a consent form, attached as Exhibit 2 in the same manner and contemporaneously with the notice or upon the request of any of the parties. Additional notices may be furnished to the parties at later stages of the proceedings, and may be included with pretrial notices and instructions.

(2) Execution of Consent.

The clerk shall not accept a consent form unless it has been signed by all parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any judge or magistrate, unless all parties

have consented to the reference to a magistrate. No magistrate, judge or other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

In the absence of receipt of a consent form executed by all parties within twenty days of the date that all parties have filed answers or have otherwise responded it shall be deemed that consent of all the parties has not been effected, and the cause of action shall proceed before the judge to whom the cause was assigned at the time suit was filed. This provision shall not preclude a judge's exercise of discretion to thereafter transfer the [⊥ 15] case to a magistrate if the judge be advised that all parties have consented to a trial before a magistrate.

The reference of a civil case to the magistrate for trial by a District Judge shall not preclude the judge from thereafter revoking the reference at any time, and in any such case in which the reference is revoked the case will thereafter be reinstated on the referring judge's docket.

(3) Reference.

After the consent form has been executed and filed, the clerk shall transmit it to the judge to whom the case has been assigned for

approval and referral of the case to a magistrate. Once the case has been assigned to a magistrate, the magistrate shall have the authority to conduct any and all proceedings and to direct the clerk of court to enter a final judgment in the same manner as if the judge had presided. [⊥ 16]

Rule 4

Review and Appeal

(a) Review of case-dispositive motions and prisoner litigation - 28 U.S.C. §636(b)(1)(B)

(1) In all matters upon which a magistrate is required to submit a report and recommendations to a district judge the magistrate shall prepare his report and recommendations in writing and shall file the same with the clerk. The clerk shall transmit a copy thereof to the judge to whom the action is assigned and to each of the parties, or to their counsel, if represented by counsel. Each party shall have ten days after service of a copy of the magistrate's report and recommendations in which to serve and file written objections to the report or recommendations to the magistrate, unless a greater or shorter time is fixed by the magistrate or judge. All such objections shall be filed with the clerk and served upon the other parties, as in other cases, and copies thereof shall also be forwarded to the judge to whom the action is assigned and to the magistrate. If the judge shall desire a response to the objections, he shall call upon the other party or parties for a response or responses

thereto, and shall fix the time within which such response or responses may be served and filed. All such responses shall be served and filed as required in the case of objections. No objection to a magistrate's report or recommendations shall be sustained unless the other party or parties have been called upon to respond thereto. [⊥ 17]

(2) The district judge shall make a de novo determination of those portions of the magistrate's report and recommendation to which specific objection is made. However, the district judge need not conduct a new hearing on the issues raised by the objections, but may base his determination upon the record made before the magistrate and may consider the magistrate's report and recommendations. The district judge may also receive further evidence, conduct further hearings, or remand the matter to the magistrate with instructions. After such further proceedings, if any, as the district judge deems appropriate, he may adopt, reject or modify, in whole or in part, the report or recommendations of the magistrate.

(b) Appeal of non-dispositive matters - 28 U.S.C. §636(b)(1)(A)

(1) In any matter which a magistrate is empowered to hear and determine, a party aggrieved by the ruling of the magistrate may appeal the magistrate's ruling to the district judge to whom the action is assigned. Such an appeal may be perfected by serving and filing within ten days of the magistrate's ruling an

application for review of such ruling specifying the grounds upon which the magistrate's ruling is claimed to be erroneous. All such applications for review shall be filed and served upon the other party or parties as in other cases, and copies thereof shall be promptly transmitted to the judge to whom the action is assigned and to the magistrate. The district judge may call upon the other party or parties to respond to the application for review, and no ruling of a [⊥ 18] magistrate shall be reversed, vacated or modified unless the other party or parties shall have been called upon to respond to the application for review.

(2) No ruling of a magistrate in any matter which he is empowered to hear and determine shall be reversed, vacated or modified on appeal unless the district judge shall determine that the findings of the magistrate are clearly erroneous, or that the magistrate's ruling is contrary to law or constitutes an abuse of discretion.

(3) The ruling of a magistrate in a matter which he is empowered to hear and determine is the ruling of the Court and is final unless reversed, vacated or modified by the district judge to whom the action is assigned, as provided in this rule. An appeal to the district judge shall not operate as a stay of a magistrate's ruling unless so ordered by the magistrate or the district judge, and then only to the extent specifically ordered by the magistrate or district judge. Any party desiring a stay of a magistrate's ruling or any part thereof, pending appeal to the district judge shall first apply therefore to the

magistrate from whose ruling the appeal is taken. If the magistrate denies a stay, written application therefor may then be made to the district judge. Any application to the district judge for a stay shall have appended thereto the certificate of counsel that application for the stay sought has been made to the magistrate and denied by him.

(c) Special Master Reports - 28 U.S.C §636(b)(2).

Any party may seek review of, or action on, a special [⊥ 19] master report filed by a magistrate in accordance with the provisions of Rule 53(e) of the Federal Rules of Civil Procedure.

(d) Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties 28 U.S.C. §636(c).

(1) Appeal to the Court of Appeals.

Upon entry of judgment in any civil case disposed of by a magistrate under authority of 28 U.S.C. §636(c) and Rule 3 of these rules, supra, on consent of the parties wherein the parties agreed to appeal any judgment directly to the Fifth Circuit, an aggrieved party shall appeal directly to the United States Court of Appeals for the Fifth Circuit in the same manner as an appeal from any other judgment of this court.

(2) Appeal to the District Judge.

(a) Notice of Appeal

Upon the entry of judgment in any civil case disposed of by a magistrate when authority of 28 U.S.C. §636(c) on

consent of the parties wherein the parties agreed to appeal any judgment to a judge of this court in accordance with 28 U.S.C. §636(c)(4), rather than directly to the Court of Appeals for the Fifth Circuit, an aggrieved party shall file written notice of appeal with the clerk of the court within thirty days after entry of the magistrate's judgment, but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within sixty [⊥ 20] days of entry of the judgment. Upon a showing of excusable neglect or good cause, the magistrate or a judge of this court may extend the time for filing a notice of appeal upon motion filed not later than thirty days after the expiration of the time prescribed by Rule 4(a), Federal Rules of Appellate Procedure.

In the event a timely motion for new trial is filed pursuant to Rule 59, Federal Rules of Civil Procedure, the time for appeal for all parties shall run from the date of the ruling on the motion.

(b) Service of the Notice of Appeal

The clerk of court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the

appellant, or if a party is not represented by counsel to the party at his last known address.

(c) Record on Appeal

The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the parties, counsel, end the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. §636(c)(4). If a [⊥ 21] transcript of the proceedings is desired the party shall designate those portions of the proceedings to be transcribed in the manner provided in Rule 10(b), Federal Rules Appellate Procedure.

(d) Memoranda

The appellant shall within forty days of the filing of the notice of appeal file a typewritten memorandum with the clerk, together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellant shall also serve a copy of the memorandum on the appellee or appellees. The appellees shall file an answering memorandum within thirty days of the filing of the

appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.

(e) Disposition of the Appeal by a Judge

The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's [⊥ 22] judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witness.

(f) Appeals from other others of a Magistrate

Appeals from any other decisions and orders of a magistrate not provided for in this rule should be taken as provided by governing statute, rule or decisional law. [⊥ 23]

Rule 5

Priorities in Performance of Magistrate's Duties and in Assignment of Duties to Magistrates

A magistrate shall give priority to the following types of matters above other matters pending on his docket:

(a) Criminal matters of all types.

(b) Prisoner petitions for relief from custody under 28 U.S.C. §2254 and 2255.

(c) Any matter pending in an action which has been set for trial and in which delay might result in postponement of trial, including but not limited to, pretrial conferences and motions to maintain or dismiss class actions.

(d) Matters pending in actions brought pursuant to Title VII, Civil Rights Act of 1964.

(e) Social Security Reviews.

(f) Prisoner complaints challenging conditions of confinement under 42 U.S.C. §1983 and related statutes.

(b) [(g)?] Any other matter designated as a priority matter by a district judge.

A magistrate shall endeavor to dispose of all priority matters pending before him which are ready for disposition before reaching non-priority matters. References of nonpriority matters to a magistrate shall be the exception, rather than the rule, and all such references shall be consistent with the

magistrate's work load and his resulting ability to give reasonably prompt attention to non-priority matters. [⊥ 24]

Rule 6

Inherent Powers of District Judges

The specification of these rules of powers and duties of magistrates shall not be construed as vesting such powers or conferring such duties exclusively upon magistrates, but the district judges of this district retain their inherent powers to act in any and all such matters. Notwithstanding reference of any of the foregoing matters to a magistrate, a district judge retains the power to act therein if, in the opinion of the district judge, the proceedings will thereby be expedited or the efficient administration of justice advanced.

This rule shall become effective on February 1, 1982, and upon these rules becoming effective the former Miscellaneous Order No. 6 and all amendments thereto shall be and are repealed.

ENTERED this *5th* day of *February*, 1982.

/s/ Holland O. Woodward?
Chief United States District Judge

[N.B. This page contains eight more blanks with signatures, mostly illegible, all titled "United States District Judge." *RJF*]

[⊥ 25]

[N.B. This page contains three more blanks with signatures, but no typed names, all titled "United States District Judge." *RJF*]

[⊥ 26]

[EXHIBIT 1] [2]

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

_____ Plaintiff	)
vs.	) Docket No. _____
_____ Defendant	)

CONSENT TO PROCEED BEFORE A
UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above captioned civil matter hereby waive their right to proceed before a judge of the United States district court and consent to have a United States magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of a final judgment.

The parties further agree and consent to the following method of appeal, in the event an appeal is sought from the judgment of the magistrate (check one):

_____ In accordance with 28 U.S.C §636(c)(3)

[2] [N.B. Not legible, but what's left highly suggests this. *RJF*]

any appeal shall be taken to the United States Court of Appeals for the Fifth Circuit.

_____ In accordance with 28 U.S.C. §636(c)(4) any appeal shall be taken to a judge of the district court. *

* An appeal under §636(c)(4) does not bar an appeal to the Fifth Circuit as provided by §636(c)(5).

Party or Counsel of Record Date

_____ _____

_____ _____

_____ _____

NOTE- Return this form to the District Clerk only if it has been executed by all parties to the case.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above captioned matter be referred to United States Magistrate _____ for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. §636(c) and the foregoing consent of the parties.

_____ _____

DATE UNITED STATES DISTRICT JUDGE

[⊥ 27]

[EXHIBIT 2] [3]

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that the United States magistrates of this district court, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Copies of appropriate consent forms for this purpose are available from the clerk of the court.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court. Only if all parties to the case consent to the reference to a magistrate will either the judge or magistrate to whom the case has been assigned be informed of your decision. The parties must consent within twenty days of the date answer(s) or responsive pleadings are filed by the defendant(s), unless otherwise permitted by the district court. Upon consent of all parties reference to a magistrate is subject to the approval and order of the district judge to whom the case is assigned.

The provisions of 28 USC §636(c)(3) and (4)

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[3] [N.B. Not legible, but what's left highly suggests this. *RJF*]

permit alternative appeals procedures, either directly to the United States Court of Appeals for the Fifth Circuit or to the district judge that referred the case to the magistrate. An appeal to the district judge does not bar a party from thereafter appealing to the Fifth Circuit as provided by §636(c)(5). In the event that the parties consent to a trial before the magistrate, they must also agree to the method of appeal at the time the consent form is executed, unless otherwise permitted by the district court.

1994 Feb. 18.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

FEB 1 8 1994

NANCY DOHERTY, CLERK
By: _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MISCELLANEOUS ORDER NO. 6

The attached amendment to Miscellaneous Order No. 6, Rule 4 was considered and adopted by the United States District Judges for the Northern District of Texas. This amendment is effective February 21, 1994. The Clerk of Court is directed to make the necessary distribution.

SO ORDERED.

DATED: February *18*, 1994.

/s/ Barefoot Sanders
BAREFOOT SANDERS, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS [⊥ 2]

RULE 4. REVIEW OF MAGISTRATE JUDGE ORDERS AND RECOMMENDATIONS AND APPEALS TO DISTRICT JUDGE OF CIVIL CASES TRIED BY CONSENT.

(a) Nondispositive Matters. Review of an order entered by a magistrate judge in a pretrial matter not dispositive of a claim or defense of a party shall be governed by Fed. R. Civ. P. 72(a). The district judge to whom the case is assigned may prescribe supplemental procedures for considering timely objections.

(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall enter a recommendation in accordance with Fed. R. Civ. P. 72(b). A party objecting to the recommended disposition, and a party who desires to respond to another party's objections, shall comply with Fed. R. Civ. P. 72(b). The district judge to whom the case is assigned may prescribe supplemental procedures for considering timely objections.

(c) Special Master Reports. Objections to a magistrate judge report filed pursuant to Fed. R. Civ. P. 53(e)(2) shall be filed in accordance with that Rule. The district judge to whom the case is assigned may prescribe supplemental procedures for considering timely objections.

(d) Appeals to District Judge of Civil Cases Tried by

Consent. Appeals to a district judge pursuant to Fed. R. Civ. P. 73(d) from judgments in civil cases tried by a magistrate judge by consent of the parties shall be governed by Fed. R. Civ. P. 74, 75, and 76. Local Rules 5.3 and 5.1(g) shall govern the length and form of briefs and the opportunity for the parties to be heard on oral argument.

1996 Mar. 25.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

MAR 2 5 1996

NANCY DOHERTY, CLERK
By: /s/ ??
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MISCELLANEOUS ORDER NO. 6

ORDER

In light of the substantial number of *pro se* civil rights actions filed in the Northern District of Texas, and in light of the fact that such cases are now

assigned cause numbers and docketed by the District Clerk prior to any judicial review, the Magistrate Judges for the Northern District of Texas are hereby authorized, *sua sponte* or upon motion of a party, to order consolidation of such cases where two or more such actions involve common questions of law or fact and, following consolidation, to order the parties to file amended pleadings in the first filed action presenting all claims or defenses asserted. (See Rule 42(a), Federal Rules of Civil Procedure). After consolidation of two or more *pro se* civil rights cases, all legal documents filed shall bear only the style and docket number of the case first filed and the later filed case(s) shall be terminated.

ENTERED this *25* day of *MARCH*, 1996.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, Chief Judge
United States District Court
Northern District of Texas

MAR 25 1996 [4]

1997 Sep. 22.

[4] [N.B. The stamp on the reverse, which bled through, is rendered as if on the front. *RJF*]

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

SEP 2 2 1997

NANCY DOHERTY, CLERK
By: _ /s/ Y. Kelly __
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MISCELLANEOUS ORDER NO. 6

ORDER

Because an order transferring venue is a non-dispositive order which may be entered by a magistrate judge pursuant to 28 U.S.C. §636(b)(1)(A), the district judges of this court conclude that it is not necessary for the magistrate judges to use the report and recommendation procedure in connection with 28 U.S.C. §§1404 and 1406 or 28 U.S.C. §2241(d) transfers of venue in cases filed by prisoners and in *pro se* civil actions in which plaintiffs seek to proceed *in forma pauperis*.

Notwithstanding contrary language in earlier referral orders, magistrate judges are authorized, without utilizing the report and recommendation procedure, to sign orders transferring cases filed by prisoners or by *pro se* plaintiffs seeking to proceed *in forma pauperis* to the proper or more appropriate district or division.

SO ORDERED.

DATED: September 22, 1997

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

1998 Oct. 1.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

OCT – 1 1998

NANCY DOHERTY, CLERK
By: /s/ Y. Kelly
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MISCELLANEOUS ORDER NO. 6

A-131

It is ORDERED that commencing October 1, 1998, the clerk of court shall include United States Magistrate Judge Charles Bleil in the automated civil case assignment system in the same manner as Fort Worth Division district judges, except no case in which a temporary restraining order or other preliminary injunctive relief is sought, bankruptcy matter (including a motion to withdraw reference), or case required by the Constitution or laws of the United States to be assigned to an Article III district judge shall be assigned to Judge Bleil. The chief judge will, from time to time, provide the proportion of civil cases to be assigned to Magistrate Judge Bleil in Special Order No. 3.

When Magistrate Judge Bleil is initially assigned to a case, he is to provide consent forms to the parties in the case to be executed and returned to the district clerk within twenty days. Although consent to a magistrate judge is voluntary, return of the executed form within twenty days of appearance is mandatory. A party does not waive jurisdictional or other defenses by filing the consent form. A party's refusal to consent to Magistrate Judge Bleil will not be docketed on the public docket or made part of the regular case file folder.

In each case assigned to Magistrate Judge Bleil, it is ORDERED that Judge Bleil shall conduct all further proceedings, including a jury or bench trial, and order the entry of a final judgment in accordance with 28 U.S.C. §636(c). If all parties do not consent to Magistrate Judge Bleil, the case will remain with Judge Bleil until the clerk is directed to randomly select a district judge and reassign the case. After reassignment to a district judge, Magistrate Judge

Bleil shall, unless the district judge otherwise orders, exercise all powers permitted by 28 U.S.C. §636(b). [⊥ 2]

Nothing in this Order shall be construed as an attempt to deprive or abridge a party's constitutional right to an Article III district judge.

SO ORDERED.

October 1, 1998

FOR THE COURT:

/s/ Jerry Buchmeyer
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Special Order 2-59 (2005 May 5)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

MAY – 5 2005

CLERK, U.S. DISTRICT COURT
By: /s/ *Y. Kelly*
Deputy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Special Order No. 2-59

1. The District Judges of this Court have considered and adopted amended Miscellaneous Order No. 6, an "Order for the Adoption of Rules for the Exercise of Powers and Performance of Duties by United States Magistrate Judges." This amended order shall take effect immediately and shall apply to all proceedings in civil and criminal actions hereafter commenced and, insofar as just and practicable, all proceedings in civil and criminal actions now pending.

2. All prior miscellaneous and special orders of this Court are superseded by amended Miscellaneous Order No. 6 to the extent they are inconsistent with its terms.

SO ORDERED.

May 5, 2005.

FOR THE COURT:

/s/ A. Joe Fish

A. JOE FISH, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS [⊥ 2]

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
F I L E D

MAY – 5 2005

CLERK, U.S. DISTRICT COURT
By: */s/ Y. Kelly*
Deputy

LOCAL RULES COMMITTEE
PROPOSED REVISION OF
MISCELLANEOUS ORDER NO. 6

ORDER FOR THE ADOPTION OF RULES FOR
THE EXERCISE OF POWERS
AND PERFORMANCE OF DUTIES BY
UNITED STATES MAGISTRATE JUDGES

RULE 1

POWERS AND DUTIES OF
MAGISTRATE JUDGES

A magistrate judge appointed to serve in the United States District Court for the Northern District of Texas is hereby granted authority and is specially designated to perform all duties that maybe performed by a United States magistrate judge under law. A magistrate judge has all power

necessary to perform such duties except as otherwise limited bylaw. Nothing in this Miscellaneous Order should be construed as limiting the powers of the district judge to perform all such duties, except as otherwise limited by law.

RULE 2

ADDITIONAL POWERS AND DUTIES OF MAGISTRATE JUDGES UNDER 28 U.S.C. § 636(b)

a. Unless otherwise directed by the presiding district judge, a magistrate judge serving within the Northern District of Texas is authorized, without further order of the court, to perform the following duties in all actions filed by prisoners, persons proceeding *pro se*, or persons seeking leave to proceed *in forma pauperis*:

(1) Review and construe papers presented to the clerk and direct the clerk as to whether [⊥ 3] and in what manner said papers will be accepted, if appropriate, for filing or other disposition by the court;

(2) Direct a litigant to resubmit pleadings or other filings on forms approved by the court, or to provide a more definite statement or amended pleadings, and to issue notices of deficiency as authorized by the rules and orders of this court;

(3) Order that the matter be transferred to another district or division if venue is not properly laid in the Northern District of Texas or the particular division in which the action was filed, or when venue is more appropriate in another district or division;

(4) Determine whether leave to proceed *in forma pauperis* should be granted unconditionally or provisionally, and to

(a)(i) enter orders permitting a *pro se* litigant to proceed *in forma pauperis*; (ii) grant leave to proceed *in forma pauperis* to a person seeking relief pursuant to 28 U.S.C. Sections 2241 and 2254, if the average six month balance of the person's inmate trust account and other financial resources are less than Fifty Dollars; and (iii) enter orders to assess and collect filing fees pursuant to the Prison Litigation Reform Act of 1996; or

(b) in the event that the magistrate judge determines that a person is not entitled to proceed *in forma pauperis*, file a recommendation setting out the reasons for the determination pursuant to 28 U.S.C. § 636(b)(1)(B);

(5) Direct litigants seeking leave to proceed *in forma pauperis* to provide additional financial information necessary to determine whether leave should be granted and to take appropriate steps or make appropriate recommendations in the event that the litigant does not provide the information; [⊥ 4]

(6) Conduct such proceedings and enter such orders as are necessary to screen matters pursuant to 28 U.S.C. § 1915, 28 U.S.C. § 1915A, 42 U.S.C. § 1997e or other provision of applicable law, including but not limited to the issuance of questionnaires, orders requiring further or more definite statement, and hearings;

(7) After screening, make all necessary and appropriate reports and recommendations if the magistrate judge determines that claims or cases are

subject to dismissal under 28 U.S.C. § 1915, 28 U.S.C. § 1915A, 42 U.S.C. § 1997e or other applicable law;

(8) After screening, make all necessary orders for issuance and service of process if leave to proceed *in forma pauperis* is granted;

(9) Make appropriate orders or reports and recommendations in proceedings brought pursuant to 28 U.S.C. Sections 2241, 2254 and 2255;

(10) Upon an order of transfer from the presiding district judge, exercise jurisdiction under 28 U.S.C. § 636(c) if, prior to service of process, the parties to the action consent to proceed before the magistrate judge; and

(11) Make appropriate orders or reports and recommendations on motions for certificates of appealability.

b. A magistrate judge performing any duties under this Rule shall have all powers necessary to perform such duties except as otherwise limited by law. [⊥ 5]

RULE 3

ASSIGNMENTS TO MAGISTRATE JUDGES

In a division with more than one magistrate judge, the clerk will select a magistrate judge in accordance with the court's random assignment procedure from among all magistrate judges in that division for any matters referred or transferred pursuant to 28 U.S.C. § 636(c) by the presiding district judge. This method of assignment does not limit the district-wide jurisdiction of a magistrate

judge.

RULE 4

CONSENT TO EXERCISE OF JURISDICTION BY A MAGISTRATE JUDGE

a. At the time any action that maybe tried by consent before a magistrate judge pursuant to 28 U.S.C. § 636(c)(1) is filed or as soon thereafter as is practicable, the clerk will provide plaintiff or plaintiffs representative an approved notice and consent form, along with a sufficient number of copies for the plaintiff to attach to the complaint and summons, when served. The plaintiff, or the defendant if the plaintiff is acting *pro se*, will be primarily responsible for securing the execution of a consent form by the parties and for filing such form with the clerk.

b. If, after the clerk has notified the parties of the availability of a magistrate judge to exercise jurisdiction, and that such consent is wholly voluntary and without any adverse consequences if a party chooses not to consent, and upon the written consents of all parties and upon an order of transfer from the presiding district judge, the clerk will reassign the case to the designated magistrate judge for all further proceedings as provided for in 28 U.S.C. § 636(c). A part-time magistrate judge may exercise consent jurisdiction when the chief judge of the court certifies that [⊥ 6] a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the Fifth Circuit.

c. Upon the death, retirement, disqualification or resignation of a magistrate judge exercising jurisdiction under this Rule, the case will be reassigned to another magistrate judge, unless a party consented to a specific magistrate judge.

SO ORDERED.

May 5, 2005.

FOR THE COURT:

/s/ A. Joe Fish
A. JOE FISH, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

TCR 70(a)(1) and (2)

DISCOVERY

RULE 70. GENERAL PROVISIONS

(a) General:

(1) *Methods and Limitations of Discovery:* In conformity with these Rules, a party may obtain discovery by written interrogatories (Rule 71), by production of documents or things (Rules 72 and 73), by depositions upon consent of the parties (Rule 74), by depositions without consent of the parties in certain cases (Rule 75), or by depositions of expert witnesses (Rule 76). However, the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules. Discovery is not available under these Rules through depositions except to the limited extent provided in Rules 74, 75, and 76. See Rules 91(a) and 100 regarding relationship of discovery to stipulations.

(2) *Time for Discovery:* Discovery shall not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue (see Rule 38). Discovery shall be completed and any motion to compel such discovery shall be filed, unless otherwise authorized by the Court, no later than 45 days prior to the date set for call of the case from a trial calendar. ...

TCR 90(a)

ADMISSIONS AND STIPULATIONS

RULE 90. REQUESTS FOR ADMISSION

(a) Scope and Time of Request:

Requests for admission shall not be commenced, without leave of Court, before the expiration of 30 days after joinder of issue (see Rule 38). Requests for admission shall be completed and any motion to review under paragraph (e) hereof shall be filed, unless otherwise authorized by the Court, no later than 45 days prior to the date set for call of the case from a trial calendar.

TCR 91

RULE 91. STIPULATIONS FOR TRIAL

(a) Stipulations Required:

(1) *General:* The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party

is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(2) *Stipulations To Be Comprehensive:* The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the scope of subparagraph (1) must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

(b) Form:
Stipulations required under this Rule shall be in writing, signed by the parties thereto or by their counsel, and shall observe the requirements of Rule 23 as to form and style of papers, except that the stipulation shall be filed with the Court in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the Court, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately

lettered or numbered. Exhibits attached to a stipulation shall be numbered serially; i.e., 1, 2, 3, etc. The exhibit number shall be followed by "P" if offered by the petitioner, e.g., 1–P; "R" if offered by the respondent, e.g., 2–R; or "J" if joint, e.g., 3–J.

(c) Filing:
Executed stipulations prepared pursuant to this Rule, and related exhibits, shall be filed by the parties at or before commencement of the trial of the case, unless the Court in the particular case shall otherwise specify. A stipulation when filed need not be offered formally to be considered in evidence.

(d) Objections:
Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial.

(e) Binding Effect:
A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding.

(f) Noncompliance by a Party:

(1) *Motion To Compel Stipulation:*

If, after the date of issuance of trial notice in a case, a party has refused or failed to confer with an adversary with respect to entering into a stipulation in accordance with this Rule, or a party has refused or failed to make such a stipulation of any matter within the terms of this Rule, the party proposing to stipulate may, at a time not later than 45 days prior to the date set for call of the case from a trial calendar, file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the motion should not be deemed admitted for the purposes of the case. The motion shall

(A) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation;

(B) set forth in express language the specific stipulation which the moving party proposes with respect to each such matter and annex thereto or make available to the Court and the other parties each document or other paper as to which the moving party desires a stipulation;

(C) set forth the sources, reasons, and basis for claiming, with respect to each such matter, that it should be stipulated;

(D) show that opposing counsel or the other parties have had reasonable access to those sources or basis for stipulation and have been informed of the reasons for stipulation; and

(E) show proof of service of a copy of the motion on opposing counsel or the other parties.

(2) *Procedure:*

Upon the filing of such a motion, an order to show cause as moved shall be issued forthwith, unless the Court shall direct otherwise. The order to show cause will be served by the Clerk, with a copy thereof sent to the moving party. Within 20 days of the service of the order to show cause, the party to whom the order is directed shall file a response with the Court, with proof of service of a copy thereof on opposing counsel or the other parties, showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons, and basis on which the responding party relies for that purpose. The Court, where it is found appropriate, may set the order to show cause for a hearing or conference at such time as the Court shall determine.

(3) *Failure of Response:*

If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be issued accordingly.

(4) *Matters Considered:*

Opposing claims of evidence will not be weighed under this Rule unless such evidence is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of trial. The Court will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not be deemed stipulated.

TCR 120

DECISION WITHOUT TRIAL

RULE 120. JUDGMENT ON THE PLEADINGS

(a) General:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. The motion shall be filed and served in accordance with the requirements otherwise applicable. See Rules 50 and 54. Such motion shall be disposed of before trial unless the Court determines otherwise.

(b) Matters Outside Pleadings:
If, on a motion for judgment on the pleadings, **matters outside the pleadings are presented** to and not excluded by the Court, the motion shall be treated as one for summary judgment and **shall be disposed of as provided in Rule 121**, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 121.

TCR 121

DECISION WITHOUT TRIAL

RULE 121. SUMMARY JUDGMENT

(a) General:
Either party may move, with or without supporting affidavits, for a summary adjudication in the moving party's favor upon all or any part of the legal issues in controversy. **Such motion may be made at any time commencing 30 days after the pleadings are closed** but within such time as not to delay the trial.

TCR 182 (as amended)

RULE 182. CASES IN WHICH THE SPECIAL TRIAL JUDGE IS AUTHORIZED TO MAKE THE DECISION

Except as otherwise directed by the Chief Judge, the following procedure shall be observed in small tax cases (as defined in Rule 170); in cases where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds $50,000; in declaratory judgment actions; and in lien or levy actions: ...

(b) Cases Involving $50,000 or Less:
Except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a Special Trial Judge who conducts the trial of a case (other than a small tax case) where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds $50,000 shall, as soon after such trial as shall be practicable, prepare proposed findings of fact and opinion, which shall then be submitted promptly to the Chief Judge.

(c) Declaratory Judgment and Lien or Levy Actions:
A Special Trial Judge who conducts the trial of a declaratory judgment action or, except in cases where findings of fact or opinion are stated orally pursuant to Rule 152, a lien or levy action, or to whom such a case is submitted for decision, shall, as soon after such trial or submission as shall be practicable,

prepare proposed findings of fact and opinion, which shall then be submitted promptly to the Chief Judge.

(d) Decision:
The Chief Judge may authorize the Special Trial Judge to make the decision of the Court in any small tax case (as defined in Rule 170); in any case where neither the amount of the deficiency placed in dispute (within the meaning of Code section 7463), nor the amount of any claimed overpayment, exceeds $50,000; in any declaratory judgment action; and in any lien or levy action, subject to such conditions and review as the Chief Judge may provide.

[effective date note omitted] (e) Procedure in Event of Assignment to a Judge:
In the event the Chief Judge decides to assign a case (other than a small tax case) to a Judge to prepare a report in accordance with Code section 7460 and to make the decision of the Court, the proposed findings of fact and opinion previously submitted to the Chief Judge shall be filed as the Special Trial Judge's recommended findings of fact and conclusions of law. Thereafter, the procedures of Rule 183(b), (c), and (d) shall apply.

(emphasis added).

TCR 183 (as amended)

RULE 183. OTHER CASES [effective date note omitted]

Except in cases subject to the provisions of Rule 182 or as otherwise provided, the following procedure shall be observed in cases tried before a Special Trial Judge:

(a) Trial and Briefs:
A Special Trial Judge shall conduct the trial of any assigned case. After such trial, the parties shall submit their briefs in accordance with the provisions of Rule 151. Unless otherwise directed, no further briefs shall be filed.

(b) Special Trial Judge's Recommendations:
After all the briefs have been filed by all the parties or the time for doing so has expired, the Special Trial Judge shall file recommended findings of fact and conclusions of law and a copy of the recommended findings of fact and conclusions of law shall be served in accordance with Rule 21.

(c) Objections:
Within 45 days after the service of the recommended findings of fact and conclusions of law, a party may serve and file specific, written objections to the recommended findings of fact and conclusions of law. A party may respond to another party's objections within 30 days after being served with a copy thereof. The above time periods may be extended by the Special Trial Judge. After the time for objections and responses has passed, the Chief Judge shall assign the case to a Judge for preparation of a report

in accordance with Code section 7460. Unless a party shall have proposed a particular finding of fact, or unless the party shall have objected to another party's proposed finding of fact, the Judge may refuse to consider the party's objection to the Special Trial Judge's recommended findings of fact and conclusions of law for failure to make such a finding or for inclusion of such finding proposed by the other party, as the case may be.

(d) Action on the Recommendations:
The Judge to whom the case is assigned may adopt the Special Trial Judge's recommended findings of fact and conclusions of law, or may modify or reject them in whole or in part, or may direct the filing of additional briefs, or may receive further evidence, or may direct oral argument, or may recommit the recommended findings of fact and conclusions of law with instructions. The Judge's action on the Special Trial Judge's recommended findings of fact and conclusions of law shall be reflected in the record by an appropriate order or report. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.

(emphasis added).

irc § 7443A(c)

Section 7443A. Special trial judges

(a) Appointment

The chief judge may, from time to time, appoint special trial judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court.

(b) Proceedings which may be assigned to special trial judges

The chief judge may assign -

(1) any declaratory judgment proceeding,

(2) any proceeding under section 7463,

(3) any proceeding where neither the amount of the deficiency placed in dispute (within the meaning of section 7463) nor the amount of any claimed overpayment exceeds $50,000,

(4) any proceeding under section 6320 or 6330, and

(5) any other proceeding which the chief judge may designate,

to be heard by the special trial judges of the court.

(c) Authority to make court decision

The court may authorize a special trial judge to make the decision of the court with respect to any proceeding described in paragraph (1), (2), (3), or (4) of subsection (b), subject to such conditions and review as the court may provide.

(**emphasis added**).

Texas Criminal Procedure Code

Art. 4.03. Courts of Appeals.

The Courts of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases except those in which the death penalty has been assessed. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, ***in which the fine imposed by the*** county court, the county criminal court or ***county court at law does not exceed one hundred dollars***, unless the sole issue is the constitutionality of the statute or ordinance on which the conviction is based.
Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Art. 4.03 (emphasis added) (the "tyranny allowed zone").

Art. 45.0215. Plea by Minor and Appearance of Parent

(a) If a defendant is younger than 17 years of age and has not had the disabilities of minority removed, the judge or justice:

(1) must take the defendant's plea in open court; and

(2) shall issue a summons to compel the defendant's parent, guardian, or managing conservator to be present during:

(A) the taking of the defendant's plea; ***and***

(B) ***all other proceedings*** relating to the case.

Art. 45.0215 (emphasis added).

Texas Rules of Appellate Procedure

Tex. R. App. P. 25.2

(a) Rights to Appeal.

(1) Of the State. The State is entitled to appeal a court's order in a criminal case as provided by Code of Criminal Procedure article 44.01

(2) Of the Defendant. A defendant in a criminal case has the right of appeal under Code of Criminal Procedure article 44.02 and these rules. The trial court shall enter a certification of the defendant's right of appeal each time it enters a judgment of guilt or other appealable order. In a plea bargain case – that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant – a defendant may appeal only:

(A) those matters that were raised by a written motion filed and ruled on before trial, or

(B) after getting the trial court's permission to appeal.

(d) ***Certification of Defendant's right of appeal.***

If the defendant is the appellant, the record must include the trial court's certification of the defendant's right to appeal under Rule 25.2(a)(2). The certification should be part of the record when notice is filed, but may be added by timely amendment or supplementation under this rule or Rule 34.5(c)(1) or Rule 37.1 or by order of the appellate court under Rule 34.5(c)(2). **The appeal must be dismissed if a certification that shows the defendant has the right of appeal has not been made part of the record under these rules.**

TEX. R. APP. P. 25.2(a), (d) (**emphasis added**) (***emphasis in original***).

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irs Notice 2008-14

Part III - Administrative, Procedural, and Miscellaneous

Frivolous Positions

Notice 2008-14

PURPOSE

Positions that are the same as or similar to the positions listed in this Notice are identified as frivolous for purposes of the penalty for a "frivolous tax return" under section 6702(a) of the Internal Revenue Code and the penalty for a "specified

frivolous submission" under section 6702(b). Persons who file a purported return of tax, including an original or amended return, based on one or more of these positions are subject to a penalty of $5,000 if the purported return of tax does not contain information on which the substantial correctness of the self-assessed determination of tax may be judged or contains information that on its face indicates the self-assessed determination of tax is substantially incorrect. Likewise, persons who submit a "specified submission" (namely, a request for a collection due process hearing or an application for an installment agreement, offer-in-compromise, or taxpayer assistance order) based on one or more of the positions listed in this Notice are subject to a penalty of $5,000. The penalty may also be applied if the purported return or any portion of the specified [⊥ 2] submission is not based on a position set forth in this Notice, yet reflects a desire to delay or impede the administration of Federal tax laws for purposes of section 6702(a)(2)(B) or 6702(b)(2)(A)(ii).

BACKGROUND

Section 407 of Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922, 2960-62 (2006), amended section 6702 to increase the amount of the penalty for frivolous tax returns from $500 to $5,000 and to impose a penalty of $5,000 on any person who submits a "specified frivolous submission." A submission is a "specified frivolous submission" if it is a "specified submission" (defined in section 6702(b)(2)(B) as a request for a hearing under section 6320 or 6330 or an application under section 6159, 7122 or 7811) and any portion of the

submission (i) is based on a position identified by the Secretary as frivolous or (ii) reflects a desire to delay or impede administration of the Federal tax laws. Section 6702 was further amended to add a new subsection (c) requiring the Secretary to prescribe, and periodically revise, a list of positions identified as frivolous. Notice 2007-30, 2007-14 I.R.B. 883, contained the prescribed list. This Notice revises the list to add more positions identified as frivolous. The positions that have been added are found in paragraphs 9(g), 11, 14 and 25.

DISCUSSION

Frivolous Positions. Positions that are the same as or similar to the following are [⊥ 3] frivolous.

(1) Compliance with the internal revenue laws is voluntary or optional and not required by law, including arguments that:

a. Filing a Federal tax or information return or paying tax is purely voluntary under the law, or similar arguments described as frivolous in Rev. Rul. 2007-20, 2007-14 I.R.B. 863.

b. Nothing in the Internal Revenue Code imposes a requirement to file a return or pay tax, or that a person is not required to file a tax return or pay a tax unless the Internal Revenue Service responds to the person's questions, correspondence, or a request to identify a provision in the Code requiring the filing of a return or the payment of tax.

c. There is no legal requirement to file a Federal income tax return because the instructions to Forms 1040, 1040A, or 1040EZ or the

Treasury regulations associated with the filing of the forms do not display an OMB control number as required by the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 et seq., or similar arguments described as frivolous in Rev. Rul. 2006-21, 2006-1 C.B. 745.

d. Because filing a tax return is not required by law, the Service must prepare a return for a taxpayer who does not file one in order to assess and collect tax.

e. A taxpayer has an option under the law to file a document or set of documents in lieu of a return or elect to file a tax return reporting zero [⊥ 4] taxable income and zero tax liability even if the taxpayer received taxable income during the taxable period for which the return is filed, or similar arguments described as frivolous in Rev. Rul. 2004-34, 2004-1. C.B. 619.

f. An employer is not legally obligated to withhold income or employment taxes on employees' wages.

g. Only persons who have contracted with the government by applying for a governmental privilege or benefit, such as holding a Social Security number, are subject to tax, and those who have contracted with the government may choose to revoke the contract at will.

h. A taxpayer may lawfully decline to pay taxes if the taxpayer disagrees with the government's use of tax revenues, or similar arguments described as frivolous in Rev. Rul. 2005-20,

2005-1 C.B. 821.

i. **An administrative summons issued by the Service is *per se* invalid and compliance with a summons is not legally required.**

(2) The Internal Revenue Code is not law (or "positive law") or its provisions are ineffective or inoperative, including the sections imposing an income tax or requiring the filing of tax returns, because the provisions have not been implemented by regulations even though the provisions in question either (a) do not expressly require the Secretary to issue implementing regulations to become effective or (b) expressly require implementing regulations which have been issued.

(3) A taxpayer's income is excluded from taxation when the taxpayer rejects or [⊥ 5] renounces United States citizenship because the taxpayer is a citizen exclusively of a State (sometimes characterized as a "natural-born citizen" of a "sovereign state"), that is claimed to be a separate country or otherwise not subject to the laws of the United States. This position includes the argument that the United States does not include all or a part of the physical territory of the 50 States and instead consists of only places such as the District of Columbia, Commonwealths and Territories (e.g., Puerto Rico), and Federal enclaves (e.g., Native American reservations and military installations), or similar arguments described as frivolous in Rev. Rul. 2004-28, 2004-1 C.B. 624, or Rev. Rul. 2007-22, 2007-14 I.R.B. 866.

(4) Wages, tips, and other compensation received for the performance of personal services are not taxable income or are offset by an equivalent deduction for the personal services rendered, including an argument that a taxpayer has a "claim of right" to exclude the cost or value of the taxpayer's labor from income or that taxpayers have a basis in their labor equal to the fair market value of the wages they receive, or similar arguments described as frivolous in Rev. Rul. 2004-29, 2004-1 C.B. 627, or Rev. Rul. 2007-19, 2007-14 I.R.B. 843.

(5) United States citizens and residents are not subject to tax on their wages or other income derived from sources within the United States, as only foreign based income or income received by nonresident aliens and foreign corporations from sources within the United States is taxable, and similar arguments described as frivolous in Rev. Rul. 2004-30, 2004-1 C.B. 622. [⊥ 6]

(6) A taxpayer has been untaxed, detaxed, or removed or redeemed from the Federal tax system though the taxpayer remains a United States citizen or resident, or similar arguments described as frivolous in Rev. Rul. 2004-31, 2004-1 C.B. 617.

(7) Only certain types of taxpayers are subject to income and employment taxes, such as employees of the Federal government, corporations, nonresident aliens, or residents of the District of Columbia or the Federal

territories, or similar arguments described as frivolous in Rev. Rul. 2006-18, 2006-1 C.B. 743.

(8) Only certain types of income are taxable, for example, income that results from the sale of alcohol, tobacco, or firearms or from transactions or activities that take place in interstate commerce.

(9) Federal income taxes are unconstitutional or a taxpayer has a constitutional right not to comply with the Federal tax laws for one of the following reasons:

a. The First Amendment permits a taxpayer to refuse to pay taxes based on religious or moral beliefs.

b. A taxpayer may withhold payment of taxes or the filing of a tax return until the Service or other government entity responds to a First Amendment petition for redress of grievances.

c. Mandatory compliance with, or enforcement of, the tax laws invades a taxpayer's right to privacy under the Fourth Amendment.

d. The requirement to file a tax return is an unreasonable search and seizure [⊥ 7] contrary to the Fourth Amendment.

e. Income taxation, tax withholding, or the assessment or collection of tax is a "taking" of property without due process of law or just compensation in violation of the Fifth Amendment.

f. The Fifth Amendment privilege against self-incrimination grants taxpayers the right not to file returns or the right to withhold all financial information from the Service.

g. The Ninth Amendment exempts those with religious or other objections to military spending from paying taxes to the extent the taxes will be used for military spending.

h. Mandatory or compelled compliance with the internal revenue laws is a form of involuntary servitude prohibited by the Thirteenth Amendment.

i. Individuals may not be taxed unless they are "citizens" within the meaning of the Fourteenth Amendment.

j. The Sixteenth Amendment was not ratified, has no effect, contradicts the Constitution as originally ratified, lacks an enabling clause, or does not authorize a non-apportioned, direct income tax.

k. Taxation of income attributed to a trust, which is a form of contract, violates the constitutional prohibition against impairment of contracts.

l. Similar constitutional arguments described as frivolous in Rev. Rul. 2005-19, 2005-1 C.B. 819.

(10) A taxpayer is not a "person" within the meaning of section 7701(a)(14) or other [⊥ 8] provisions of the Internal Revenue Code, or

similar arguments described as frivolous in Rev. Rul. 2007-22, 2007-14 I.R.B. 866.

(11) **Only fiduciaries are taxpayers, or only persons with a fiduciary relationship to the United States are obligated to pay taxes, and the United States or the Service must prove the fiduciary status or relationship.**

(12) Federal Reserve Notes are not taxable income when paid to a taxpayer because they are not gold or silver and may not be redeemed for gold or silver.

(13) In a transaction using gold and silver coins, the value of the coins is excluded from income or the amount realized in the transaction is the face value of the coins and not their fair market value for purposes of determining taxable income.

(14) A taxpayer who is employed on board a ship that provides meals at no cost to the taxpayer as part of the employment may claim a so-called "Mariner's Tax Deduction" (or the like) allowing the taxpayer to deduct from gross income the cost of the meals as an employee business expense.

(15) A taxpayer may purport to operate a home-based business as a basis to deduct as business expenses the taxpayer's personal expenses or the costs of maintaining the taxpayer's household when the maintenance items or amounts as reported do not correspond to a bona fide home business, such as when they are grossly excessive in

relation to the conceivable costs for some portion of the home being used exclusively and regularly as a business, or similar [⊥ 9] arguments described as frivolous by Rev. Rul. 2004-32, 2004-1 C.B. 621.

(16) A "reparations" tax credit exists, including arguments that African-American taxpayers may claim a tax credit on their Federal income tax returns as reparations for slavery or other historical mistreatment, that Native Americans are entitled to an analogous credit (or are exempt from Federal income tax on the basis of a treaty), or similar arguments described as frivolous in Rev. Rul. 2004-33, 2004-1 C.B. 628, or Rev. Rul. 2006-20, 2006-1 C.B. 746.

(17) A Native American or other taxpayer who is not an employer engaged in a trade or business may nevertheless claim (for example, in an amount exceeding all reported income) the Indian Employment Credit under section 45A, which explicitly requires, among other criteria, that the taxpayer be an employer engaged in a trade or business to claim the credit.

(18) A taxpayer's wages are excluded from Social Security taxes if the taxpayer waives the right to receive Social Security benefits, or a taxpayer is entitled to a refund of, or may claim a charitable-contribution deduction for, the Social Security taxes that the taxpayer has paid, or similar arguments described as frivolous in Rev. Rul. 2005-17, 2005-1 C.B. 823.

(19) Taxpayers may reduce or eliminate their Federal tax liability by altering a tax return, including striking out the penalty-of-perjury declaration, or attaching documents to the return, such as a disclaimer of liability, or similar arguments described as frivolous in Rev. Rul. 2005-18, 2005-1 C.B. 817.

(20) A taxpayer is not obligated to pay income tax because the government has [⊥ 10] created an entity separate and distinct from the taxpayer—a "straw man"—that is distinguishable from the taxpayer by some variation of the taxpayer's name, and any tax obligations are exclusively those of the "straw man," or similar arguments described as frivolous in Rev. Rul. 2005-21, 2005-1 C.B. 822.

(21) Inserting the phrase "nunc pro tunc" on a return or other document filed with or submitted to the Service has a legal effect, such as reducing a taxpayer's tax liability, or similar arguments described as frivolous in Rev. Rul. 2006-17, 2006-1 C.B. 748.

(22) A taxpayer may avoid tax on income by attributing the income to a trust, including the argument that a taxpayer can put all of the taxpayer's assets into a trust to avoid income tax while still retaining substantial powers of ownership and control over those assets or that a taxpayer may claim an expense deduction for the income attributed to a trust, or similar arguments described as frivolous in Rev. Rul. 2006-19, 2006-1 C.B. 749.

(23) A taxpayer may lawfully avoid income tax by sending income offshore, including depositing income into a foreign bank account.

(24) A taxpayer can claim the section 44 Disabled Access Credit to reduce tax or generate a refund, for example, by purportedly having purchased equipment or services for an inflated price (which may or may not have been actually paid), even though it is apparent that the taxpayer did not operate a small business that purchased the equipment or services to comply with the requirements of the Americans with Disabilities Act. [⊥ 11]

(25) A taxpayer may claim the section 6421 fuels tax credit, which is limited to gasoline used in an off-highway business use, even though the taxpayer did not purchase and use gasoline during the taxable period for which the credit is claimed for an off-highway business use. Also, if the taxpayer claims an amount of credit that is so disproportionately excessive to any (including zero) business income reported on the taxpayer's income tax return as to be patently unallowable a credit that is 150 percent of business income reported on Form 1040) or facially reflects an impossible quantity of gasoline given the business use, if any, as reported by the taxpayer.

(26) A taxpayer is allowed to buy or sell the right to claim a child as a qualifying child for purposes of the Earned Income Tax Credit.

(27) An IRS Form 23C, *Assessment Certificate - Summary Record of Assessment*, is an invalid record of assessment for purposes of section 6203 and Treas. Reg. § 301.6203-1, [sic] the Form 23C must be personally signed by the Secretary of the Treasury for an assessment to be valid, [sic] the Service must provide a copy of the Form 23C to a taxpayer if requested before taking collection action, or similar arguments described as frivolous in Rev. Rul. 2007-21, 2007-14 I.R.B. 865.

(28) A tax assessment is invalid because the assessment was made from a section 6020(b) substitute for return, which is not a valid return.

(29) A statutory notice of deficiency is invalid because the taxpayer to whom the notice was sent did not file an income tax return reporting the deficiency or [⊥ 12] because the statutory notice of deficiency was unsigned or not signed by the Secretary of the Treasury or by someone with delegated authority.

(30) A Notice of Federal Tax Lien is invalid because it is not signed by a particular official (such as by the Secretary of the Treasury), or because it was filed by someone without delegated authority.

(31) The form or content of a Notice of Federal Tax Lien is controlled by or subject to a state or local law, and a Notice of Federal Tax Lien that does not comply in form or content with a state or local law is invalid.

(32) A collection due process notice under section 6320 or 6330 is invalid if it is not signed by the Secretary of the Treasury or other particular official, or if no certificate of assessment is attached.

(33) Verification under section 6330 that the requirements of any applicable law or administrative procedure have been met may only be based on one or more particular forms or documents (which must be in a certain format), such as a summary record of assessment, or that the particular forms or documents or the ones on which verification was actually determined must be provided to a taxpayer at a collection due process hearing.

(34) A Notice and Demand is invalid because it was not signed, was not on the correct form (e.g., a Form 17), or was not accompanied by a certificate of assessment when mailed.

(35) The United States Tax Court is an illegitimate court or does not, for any purported constitutional or other reason, have the authority to hear and decide [⊥ 13] matters within its jurisdiction.

(36) Federal courts may not enforce the internal revenue laws because their jurisdiction is limited to admiralty or maritime cases or issues.

(37) Revenue Officers are not authorized to issue levies or Notices of Federal Tax Lien or to seize property in satisfaction of unpaid taxes.

(38) A Service employee lacks the authority to carry out the employee's duties because the employee does not possess a certain type of identification or credential, for example, a pocket commission or a badge, or it is not in the correct form or on the right medium.

(39) A person may represent a taxpayer before the Service or in court proceedings even if the person does not have a power of attorney from the taxpayer, has not been enrolled to practice before the Service, or has not been admitted to practice before the court.

(40) A civil action to collect unpaid taxes or penalties must be personally authorized by the Secretary of the Treasury and the Attorney General.

(41) A taxpayer's income is not taxable if the taxpayer assigns or attributes the income to a religious organization (a "corporation sole" or ministerial trust) claimed to be tax-exempt under section 501(c)(3), or similar arguments described as frivolous in Rev. Rul. 2004-27, 2004-1 C.B. 625.

(42) The Service is not an agency of the United States government but rather a private-sector corporation or an agency of a State or Territory without authority to administer the internal revenue laws. [⊥ 14]

(43) Any position described as frivolous in any revenue ruling or other published guidance in existence when the return adopting the position is filed with or the specified submission adopting the position is

submitted to the Service.

Returns or submissions that contain positions not listed above, which on their face have no basis for validity in existing law, or which have been deemed frivolous in a published opinion of the United States Tax Court or other court of competent jurisdiction, may be determined to reflect a desire to delay or impede the administration of Federal tax laws and thereby subject to the $5,000 penalty.

The list of frivolous positions above will be periodically revised as required by section 6702(c).

EFFECTIVE DATE

This Notice is effective for submissions made and issues raised after Jan. 14, 2008. For submissions made and issues raised between March 16, 2007, and Jan. 14, 2008, Notice 2007-30 applies.

EFFECT ON OTHER DOCUMENTS

Notice 2007-30 is modified and superseded.

DRAFTING INFORMATION

The principal author of this notice is the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this notice, contact the Office of the Associate Chief Counsel (Procedure and Administration), Branch 2, [⊥ 15] at (202) 622-4940 (not a toll-free call).

(**bold emphasis** added) (underscore and *italics* are as such in the original)

Rule 14.1(i)(vi)—Additional Materials

2010 Mar 12—Supreme Court of Texas (direct appeal of "criminal" case) (declared "civil")

[SEAL of THE STATE OF TEXAS]

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 09-1028 DATE: 3/12/2010
COA #: 05-08-00984-CR TC #: 002-81238-06
STYLE: RICHARD JOHN FLORANCE, JR.
v. STATE OF TEXAS

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:
MR. RICHARD JOHN FLORANCE JR.
1908 VASSAR DRIVE
RICHARDSON TX 75081

[Pitney Bowes meter mark:
02 1A $ 00.28[0]
0004392386 MAR 12 2010
MAILED FROM ZIP CODE 78 701]

2006 Jul 13—RUSCH's "order" documenting STATE's confession of having no case

FILED
06 JUL 13 AM 8:58
HANNAH KUNKLE
DISTRICT CLERK
COLLIN COUNTY, TEXAS
By /s/ DEPUTY

FILED
COUNTY COURT AT LAW
2006 JUL 13 AM 10:33
_____ CLERK
COLLIN COUNTY, TEXAS
By /s/ Deputy [1]

MISCELLANEOUS DOCKET NO. *401-02217-06*

	§	**IN THE DISTRICT**
	§	**COURT**
IN RE: A PURPORTED	§	
LIEN OR CLAIM	§	***401st*** **JUDICIAL**
AGAINST CLERK	§	**DISTRICT**
BRENDA TAYLOR	§	
	§	**COLLIN COUNTY,**
	§	**TEXAS**

JUDICIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING A DOCUMENT PURPORTING TO CREATE A LIEN

On this the 13th day of July, 2006, in the above-

[1] [N.B. Filestamp of the conformed copy filed in the County Court. *See* No. 06-777. *RJF*]

entitled and numbered cause, this Court reviewed a motion, verified by affidavit, of Collin County Clerk Brenda Taylor and the documentation attached thereto, No testimony was taken from any party, nor was there any notice of the Court's review, the Court having made the determination that a decision could be made solely on review of the documentation or instrument under the authority vested the Court under Subchapter j, Chapter 51 TEXAS GOVERNMENT CODE.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED THAT after reviewing Collin County Clerk Brenda Taylor's MOTION FOR JUDICIAL REVIEW OF DOCUMENTATION OR INSTRUMENT PURPORTING TO CREATE A LIEN OR CLAIM and documentation, the Court hereby **FINDS** that the documentation ["FLORANCE'S FIRST NOTICE OF LIEN"] is fraudulent as defined by TEXAS GOVERNMENT CODE §51.901(c) and:

(1) IS NOT provided for by specific State or Federal statutes or Constitutional provisions;

(2) IS NOT created by implied or express consent or agreement of the obligor, debtor or the owner of the real or personal property or an interest in the real or personal property, if required under the law of this State or by implied or express consent or agreement of an agent, fiduciary, or other representative of that person;

(3) IS NOT an equitable, constructive, or other lien imposed by a court of competent jurisdiction created by or established under the Constitution or laws of this State or the United States;

(4) IS NOT [2] asserted against real or personal property or an interest in real or personal property. There is no valid lien or claim created by "FLORANCE'S FIRST NOTICE OF LIEN".

[⊥ 2]

This Court makes no finding as to any underlying claims of the parties involved, and expressly limits its findings of fact and conclusions of law to the review of a ministerial act. The County clerk shall file this finding of fact and conclusion of law in the same class of records as the subject documentation or instrument was originally filed, and the Court directs the County Clerk to index it using the same names that were used in indexing the subject documentation or instrument.

Signed this the *13* day of *July*, 2006

/s/ Mark J. Rusch
DISTRICT COURT JUDGE

[2] [N.B. This tracks the *form*, exactly. West Virginia copied this exactly. Kansas fixed this part of it. *RJF*]

2006 Mar 17—BUCHMEYER's "Order", using the *second* of three case styles, finding RJF sanctionable as a Removing Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD JOHN FLORANCE, JR., individually and as next friend to AMANDA FLORANCE, a minor,	§
Plaintiff,	§
vs.	§
THE STATE OF TEXAS,	§
Defendant.	§
	§
	§
	§
	§
	§
	§
Civil Action No. 3:06-cv-121-R	§
	§
	§
	§
	§
	§

Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, this Memorandum Opinion and Order revises the Memorandum Opinion and Order entered March 7, 2006.

MEMORANDUM OPINION AND ORDER

Now before the Court is Brenda Taylor's Motion to Remand (filed January 23, 2006). In that motion, Taylor requests that the Court remand the case to state court; award her attorney's fees incurred as a result of the removal; and impose Rule 11 sanctions on Plaintiff, Richard Florance. For the reasons stated below, the Court **GRANTS** the motion to remand and motion for attorney's fees, but **DENIES** the motion for Rule 11 Sanctions.

I. BACKGROUND

This case was originally filed on June 13, 2005 by Plaintiff, Richard Florance, in the Collin County Court at Law No. 1. [1] In that suit, Florance sought mandamus relief and a declaratory judgment to challenge the Plano Municipal Court's jurisdiction over his daughter's class C [⊥ 2] misdemeanor citation for being a minor in possession of alcohol. [2] While the case was pending, Florance removed his daughter's municipal court prosecution to the Sherman Division of the U.S. District Court for the Eastern District of Texas.[3] A United States Magistrate Judge promptly remanded the criminal prosecution back to the municipal court.[4] Ultimately, the Collin County Court dismissed Florance's

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[1] *Amanda Florance, a minor, and Richard John Florance v. State of Texas*, Cause No. 001-1412-05, County Court No. 1 of Collin County, Texas.

[2] *State of Texas v. Amanda Jean Florance, et al.*, Cause No. 2005007697.

[3] *See State of Texas v. Amanda Jean Florance*, No 4:05-CV-264 (E.D.Tex. 2005).

[4] *See* Doc. No. 11 (4:05-CV-264) (E.D.Tex. 2005) (Order of Remand). [⊥ 2]

separate suit for declaratory relief, *Amanda Florance, a minor, and Richard John Florance v. State of Texas*, Cause No. 001-1412-05.

Undaunted, Florance appealed the dismissal to the Dallas Court of Appeals. While his appeal was pending, the court of appeals ordered Florance to pay $129 for preparation of the clerk's record. Florance begrudgingly paid the fee but, in retaliation, filed a document entitled "Florence's First Notice of Lien" against all real and personal property owned by Brenda Taylor, the Collin County Clerk. Taylor's counsel immediately demanded that Florence withdraw the filing, but he did not comply. Taylor then moved for judicial review of the purported lien, injunctive relief, and sanctions. The hearing on Taylor's motion was scheduled for February 9, 2006.

For reasons beyond the Court's comprehension, Plaintiff removed the case to the U.S. District Court for the Northern District of Texas on January 18, 2006, even though Collin County is located in the U.S. District Court for the Eastern District of Texas. Taylor has now moved to remand the case back to state court and has requested that the Court enter an award of costs and attorneys' fees associated with challenging the removal. In addition, Taylor asks the Court to sanction Florance under Rule 11 of the Federal Rules of Civil Procedure. [⊥ 3]

II. ANALYSIS

The Court will first address whether remand is appropriate before proceeding to Taylor's request for attorney's fees and motion for sanctions.

A. Removal & Remand

Federal law permits the removal of state court actions to federal court. See 28 U.S.C. §§1441-1446. While the removal statutes permit defendants to remove actions brought against them in state court, see 28 U.S.C. §§1441, 1446(a), no statute gives plaintiffs the authority to remove cases to federal court. For that reason, it is well settled that defendants are the only parties that may exercise the power of removal. *See Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). A plaintiff in state court cannot remove the case to federal court, regardless of whether the federal court would have had subject matter jurisdiction if the case had been initially filed in federal court. *See Andrews v. Spicer*, 2004 WL 2826396 *1 (N.D.Tex. 2004) ("The removal statute does not give plaintiffs the power to remove cases to federal court and the Court will not ignore the will of Congress and create such a right."); *Horton v. Nacogdoches Indep. School Dist.*, 81 F.Supp.2d 707, 710 (E.D.Tex.2000) ("While it is a plaintiffs prerogative to choose the initial forum for his suit, once he files in state court there is no valid authority providing plaintiffs the power of removal to federal court.").

Richard Florance is the plaintiff in this case. As plaintiff; he had no right to remove his case to federal court. Accordingly, the Court will grant Taylor's request for remand.

B. Costs and Attorney's Fees under 28 U.S.C. §1447(c)

When granting a motion for remand, a district court may order the removing party to pay the

opposing party its "just costs and any actual expenses, including attorney's fees, incurred as a result [⊥ 4] of the removal," 28 U.S.C. §1447(c). An award of attorney's fees under §1447(c) is entirely within the district court's discretion. *See Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993). As the Fifth Circuit has noted, the commentary to §1447(c) states that the central question in determining whether to impose fees on remand to state court is the propriety of the removal. *See Miranti*, 3 F.3d at 928 (citing David D. Siegel, Commentary on 1988 Revision of 28 U.S.C.A. §1447 (West Supp. 1993)). In other words, "the court should consider whether the defendant had objectively reasonable grounds to believe the removal was legally proper." *Dimitrijevic v. TV & C GP Holding Inc.*, 2005 WL 2656256 *2 (S.D.Tex. 2005) (citing *Valdes*, 199 F.3d at 292).

The Court has already determined that Florance's removal was improper since a plaintiff cannot remove a case to federal court.[5] More significantly, Florance already knew from his prior attempt at removal that his lawsuits were filed within the Eastern District of Texas, not the Northern District.

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[5] As further proof of the impropriety of Florance's removal, the commentary to §1447 does not even contemplate that a plaintiff may remove a case. The commentary on the 1988 revision, which was cited in *Miranti*, states:

> [S]ubdivision (c) now authorizes the court to add 'actual expenses, including attorney fees', should it find that it was improper for the *defendant* to remove the ease. The matter is left to the court's discretion, to be exercised based on the nature of the removal and the nature of the remand.

David D. Siegel, commentary on 1988 Revision of See. 1447(c), in 28 U.S.C.A. §1447 (west 2005) (emphasis added).

Based on the record of this case, the Court believes that Florance's attempt to remove the case to this Court was clearly improper and unjustified. Therefore, the Court will exercise its discretionary power to award Taylor her costs and attorney's fees pursuant to § 1447(c).

Pursuant to § 1447(c), the Court finds that Taylor is entitled to recover from Plaintiff her just costs and any actual expenses, including attorney's fees, limited to the "fees and costs incurred in federal court that would not have been incurred had the case remained in state court." *See Avitts v.* [⊥ 5] *Amoco Prod. Co.*, 111 F.3d 30, 32 (5th Cir. 1997). Taylor may apply to the court for such an award no later than 30 days from the date of this opinion. The application for costs and attorney's fees should be supported by citations to relevant authorities, affidavits, and billing records.

C. Rule 11 Sanctions

Taylor's motion for remand also requests that the Court sanction Florance under Rule 11 of the Federal Rules of Civil Procedure for removing the case in a frivolous and vexatious manner. Rule 11 states that a party or attorney's signature on a document filed with the court certifies that: (1) he or she has conducted a reasonable inquiry into the facts that support the document; (2) he or she has conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and (3) the argument is not interposed for the purposes of delay, harassment, or increasing the cost of litigation. *See Childs v. State*

Farm Mutual Automobile Insurance Co., 29 F.3d 1018, 1024 (5th Cir. 1994).

The facts indicate that Florance's removal had no basis in law and was filed in bad faith and for purposes of delay. After his first failed attempt to remove the case, Florance knew that he could not remove the case. He also knew that even if he could, the case should have been removed to the U.S. District Court for the Eastern District of Texas, not the Northern District of Texas. Florance had already been warned by opposing counsel that Taylor would seek sanctions against him for any costs and fees incurred in attempting to strike his First Notice of Lien if he did not withdraw it (which he did not).

Although Taylor's [sic?] conduct is clearly sanctionable, the Court denies Taylor's request for sanctions because she has failed to abide by the safe harbor provision of Rule 11. The safe harbor [⊥ 6] provision mandates that a motion for sanctions "shall not be filed with or presented to the court unless, within 21 days after service of the motion... the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." FED. R. CIV. P. 11(c)(1)(A). From a purely temporal perspective, Taylor did not comply with the "safe harbor" requirement. Her letter to Florance was sent on January 20, 2006, and her motion for sanctions was filed only three days later as part of her motion for remand. Because Taylor's motion for sanctions was not made in accordance with Rule 11, the motion must be denied. *See Tompkins v. Cyr*, 995 F.Supp. 689, 693 (N.D.Tex. 1998); *Park Nat. Bank of Houston v. Kaminetzky*, 976 F.Supp. 571, 588 (S.D.Tex. 1996).

III. CONCLUSION

The Court **GRANTS** Defendant's motion to remand. Therefore, this matter is hereby **REMANDED** to the Collin County Court at Law No. 1. Defendant's motion for costs and attorney's fees is **GRANTED**, but Defendant's Motion for Rule 11 Sanctions is **DENIED**.

It is so ORDERED.

SIGNED: March 17, 2006

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
SENIOR UNITED STATES DISTRICT JUDGE

2006 May 3/4—BUCHMEYER's "Order", using the *third* case style (RJF as *defendant* sans party alignment identifiers), awarding attorneys fees to DAVIS as sanctions to punish RJF for being a Removing Plaintiff

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
MAY – 4 2006
CLERK, U.S. DISTRICT COURT
By: /s/ ??
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BRENDA TAYLOR, individually	§	
	§	
V.	§	
	§	
RICHARD JOHN FLORANCE, JR.,	§	
Individually and as Next Friend to	§	
AMANDA FLORANCE, a minor	§	
	§	
	§	**CIVIL ACTION NO. 3:06-CV-121-R**
	§	
	§	
	§	
	§	

ORDER AWARDING ATTORNEY'S FEES AND COSTS TO BRENDA TAYLOR

Came on to be considered the APPLICATION FOR ATTORNEY'S FEES AND COSTS AND BRIEF IN SUPPORT filed by Collin County Clerk Brenda Taylor, and the Court having considered same and having previously issued its MEMORANDUM OPINION AND ORDER of March 17, 2006, is of the opinion that Brenda Taylor's APPLICATION FOR ATTORNEY'S FEES AND COSTS AND BRIEF IN SUPPORT should be granted.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. §1447(c), Brenda Taylor be and hereby is awarded attorney's fees and costs in the amount of

$ *3,676.39*. Such sum shall be paid by Richard John Florance, Jr. to the counsel for Collin County by a cashiers check or money order on or before thirty days from the signing of this Order.

SIGNED, this the *3* day of *May*, 2006.

/s/ Jerry Buchmeyer
UNITED STATES DISTRICT JUDGE